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REPORTS

John OF White.
1850

CASES AT LAW AND IN EQUITY,

515

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

During part of January Term, and of June Term, 1843.

BY THE JUDGES OF THE COURT.

V0565

VOLUME V—NEW SERIES.

TUSCALOOSA:
PRINTED BY M. D. J. SLADE.

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RULES.

ADOPTED AT THE JUNE TERM, 1842.

It shall be the duty of the several Clerks and Registers of Courts, in vacation, to permit the Attorney or Solicitor of record for either party in any suit pending in their courts, to take from the office, the papers in any cause, and retain them for the space of twenty-four hours at any one time, executing a receipt therefor. The papers not to be carried beyond the limits of the town in which the Office of the Register or Clerk is located; and the Clerk or Register shall at all times have access to them.

Rules for the action of ejectment, in certain cases.

1. Where several actions of ejectment have been commenced for the same premises on the demises of different lessors—it may be lawful for the plaintiff in either of the cases during the pendency of his suit, to serve a copy of his declaration on the lessors of the plaintiff or his attorney in the other case or cases, with a notice of the pendency of his action, and to require him, or them, to defend against the same. And in the event of a recovery by the plaintiff giving the notice, it shall not be lawful for the plaintiff, notified as aforesaid, to proceed in the action for the recovery of the tenements sued for, but only for costs and damages: *Provided*, that sixty days notice shall be given before the said plaintiff shall be required to join in the consent rule.

2. That whenever a recovery has been had in any action of ejectment, and there has been, and there is, pending, an action for the recovery of the same tenements, which action was commenced before the recovery of the lessors of the plaintiff in the former suit, it shall be lawful for the plainriff in the suit pending, to serve a copy of his declaration, upon the parties in possession or who, claim interest under the recovery as aforesaid, notifying the said parties of the pendency of the action, and requiring them to defend against the same, and the parties so notified may defend with, or in lieu of the tenants in possession: *Provided*, that the notice hereby contemplated shall be given sixty days before the trial of the cause.

3. That after a recovery by a plaintiff in any action of ejectment as aforesaid, it shall be lawful for the circuit court to admit his lessors to defend in any action of ejectment which may be pending at the time of his recovery, upon a motion to the court for this purpose.

And it is made the duty of the court to set forth in the order admitting parties under either of these rules, the facts which entitle them to admission.

Rules adopted at January Term, 1844.

Hereafter causes pending in this court shall be disposed of in the following order, viz: At the Winter Term—

1. The causes brought up from the sixth circuit.
2. Those from the remainder of the southern division.
3. If there shall be any causes from the sixth circuit still open, these shall be now disposed of.

4th and lastly—The docket of the northern division shall be taken up and called.

At the Summer Term.

1. Causes from the sixth circuit.
2. The docket of the northern division.
3. Causes still undisposed of from the sixth circuit.

4th and lastly—The causes from the remainder of the southern division.

Rules adopted at June Term, 1844.

GENERAL RULES.

1. Whenever a cause shall be directed to be reheard, after an opinion shall have been pronounced, the party against whom the opinion is pronounced, shall open and conclude the argument.

2. In cases where a re-argument shall be directed by the court, and no opinion intimated, the court will prescribe the course of argument, and the questions on which they desire to be heard.

GENERAL RULE.

Ordered, That applicants for examination for license to practice at the bar of this court, may be examined on the first Tuesday, and fourth Saturday in the term, and on no other days.

Further, That applicants will be examined generally upon the common and statute law; particularly upon titles to real and personal estate; upon commercial law; upon the law of pleading and evidence, as applicable to the different actions and pleas; upon the law of contracts; equity in general; pleading and practice in chancery; and criminal law.

We deem it proper to make this declaration, that we may be saved the loss of time consequent upon a useless examination, and the unqualified applicant the mortification of disclosing the deficiency of his attainments.

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REPORTS

OF

CASES ARGUED AND DETERMINED,

JANUARY TERM, 1843.

THE BRANCH BANK AT DECATUR v. KINSEY.

1. A bill of exceptions allowed and sealed by the Court, becomes a part of the record, and cannot be altered or amended by the Judge after the adjournment of the Court.
2. In a contest between a creditor and one claiming by deed from the debtor, the consideration is not proved by the recital in the deed, but must be shown by extrinsic evidence.

ERROR to the Circuit Court of Lawrence.

Original attachment v. Joshua T. Kinsey, by the plaintiff in error, which was levied on certain slaves. To the property thus levied on, John M. Kinsey set up a claim, by affidavit, under the statute, and gave bond to try the right of property; and the cause coming on to be tried, a verdict and judgment was rendered for the claimant.

Pending the trial, a bill of exceptions was taken, from which it appears, that the Bank proved the slaves in controversy to have been in the possession of the defendant in the attachment, at the time of the levy by the sheriff, and also proved the value of the property.

The claimant then introduced, and proved the execution of, a bill of sale, dated the 19th June, 1841, from the defendant in attachment to him, conveying the slaves levied on, and others, to him, for the sum of three thousand three hundred dollars, recited in the instrument, to have been received in full payment for the same, but without proving the consideration therein specified.

To the admission of which, as evidence, without proof of the facts recited in it, the plaintiff excepted; which motion the Court overruled, and permitted the same to be read to the jury as *prima facie* evidence of the consideration therein recited.

To this decision of the Court, the plaintiff excepted, and prayed that his bill of exceptions might be sealed and made a part of the record; and it was accordingly signed and sealed by the presiding Judge.

A second bill of exceptions is found in the transcript, which recites, that "Whereas, at the trial of this cause, which was a trial of the right of property, of which defendant was claimant, a bill of exceptions was hastily prepared on the eve of adjournment, and signed and sealed by the Court, without having been either seen or examined by the leading counsel for the defendant, in which occurred several errors and omissions in the statement of the evidence, and the purpose of the Court is now to correct these errors, and place the case in its true position. The bill of exceptions, as signed and sealed by the Court, on the trial of the cause, runs thus."

[Here follows a literal copy of the bill of exceptions.]

"In lieu thereof, the Court now substitutes the following bill of exceptions, at the instance of defendant's counsel, who was not consulted at the preparation of the first, and which contains, substantially, all the evidence adduced on the trial of the cause, in the order in which it was presented."

The bill of exceptions, thus presented, states, in substance, that the claimant proved that the slaves levied on, were in his possession, by his overseer, at the time of the levy, and that the defendant in attachment was living on the plantation, by the sufferance of the claimant.

And that further, after reading the bill of sale to the jury, he proved by the subscribing witness, that the consideration therein expressed, had, in fact, been paid by the claimant to the defendant, &c. dated 30th of November, 1842.

The plaintiff assigns for error, that the Court erred in admiting the evidence offered by the claimant, as set out in the bill of exceptions.

McClung, for plaintiff in error.
S. Parsons, *contra.*

ORMOND, J.—Previous to an examination of this cause, it is necessary to settle which of the two bills of exceptions found in the record, is to be considered by this Court as the true bill of exceptions in the cause.

The manner in which a bill of exceptions shall be taken, and its effect when allowed by the Court, are regulated by statute. "If in the trial of any cause, either the plaintiff or defendant shall think himself aggrieved by the direction or decision of any Judge of any of the Courts in this Territory, the party so considering himself aggrieved, may, in person or by his counsel, tender to the Judge giving such direction or decision, a bill of exceptions to his opinion, stating the points in which he is supposed to err, and the said Judge shall be bound to sign and seal the same; and the said bill of exceptions, so signed and sealed, shall be made and considered a part of the record in the cause; and in case the said Judge shall refuse to sign and seal the said bill of exceptions, if the facts therein are truly stated, he shall be guilty of a high misdemeanor in office; and in all cases in which the Judge of an inferior court may fail or refuse to certify any exception taken on the trial of any cause, it shall be lawful for the Supreme Court to receive such evidence of the exception as may be satisfactory to it, and try the said cause in the same manner as if the said exception had been certified by the Judge who tried the cause." [Aik. Dig. 254, § 5.]

It will be seen from this, that when a bill of exceptions is allowed and sealed by the Judge, it becomes a part of the record, and being matter of record, is as much beyond his control, after the adjournment of the Court, as any other part of the record.

It is true, that in Strader, Perine & Co. v. Alexander, [9th Porter, 441,] it was held by this Court, that it was not a valid objection to a bill of exceptions that it was sealed after the adjournment of the Court, if the exception be taken at the trial of the cause; and that when so sealed, it operates by relation to the time of the

trial. But this decision is confined to those cases, when the point or matter excepted to, is reserved at the time of trial, and from some sufficient cause the bill is not sealed during the term of the Court; and cannot apply to a case like the present, where the exception was not only taken and allowed, but the bill actually sealed, and thus made a part of the record. To permit it to be abrogated, and another substituted in its place, after the Court has adjourned, by the Judge, would let in all the evils which would follow, from the mutilation of any other part of the record; though it would, doubtless, be competent for the Court, at a succeeding term, on sufficient evidence, to amend a bill of exceptions, as it could any other part of the record, *nunc pro tunc;* so as to make it speak the truth of the case.

Cases may exist, in which, a bill of exceptions surreptitiously or fraudulently obtained from the Court, would, on proof of the fact, be disregarded by this Court. Nothing of that kind is pretended in this case. The facts doubtless, are, that the first bill of exceptions was sealed without sufficient consideration, and the second is the result of an attempt to ward off any mischief which might result from it. From what has been said, however, it will sufficiently appear that the first bill of exceptions, sealed during the term, can alone be considered as part of the record.

The facts there disclosed, show, that the Court erred. A voluntary conveyance of property is void as against creditors; in a contest, therefore, between a creditor and one claiming through the debtor, it is necessary for the latter to prove that the conveyance was not voluntary, by showing that a valuable consideration was given for the property. This is not shewn by the recital of that fact in the conveyance, as that is the mere declaration, or admission of the grantor, but must be proved by extrinsic evidence.

This is not questioned by the counsel for the defendant in error, but he insists that the true construction of the bill of exceptions is, that the objection in the Court below was, that the conveyance could not be read until the consideration was proved, and not that it was not necessary to prove the consideration, at some time during the trial.

It is certainly the privilege of a party to present his testimony in the mode his judgment or fancy may dictate, and if relevant, it cannot be objected to, although it may be of no avail without fur-

ther proof. So in this case, the defendant could have proved the execution of his conveyance, and read it to the jury, and afterwards have proved its consideration, and indeed this would seem to be the natural order in which to present it.

But we do not understand this to be the point intended to be raised on the bill of exceptions. The statement is, that the claimant proved the execution of the deed, and offered to read it to the jury; "to the admission of which, as evidence of the facts recited in it, without further proof, the plaintiff, by his counsel objected, and moves the Court to exclude the same from the jury; which motion the Court overruled, but admitted the same to be read to the jury as *prima facie* evidence of the *consideration* therein specified, without further proof thereof."

It would be doing great violence to the language here employed, and to the ordinary rules of interpretation, to understand the objection here raised to be to the *time* merely, when the instrument was offered to be read as evidence, and not to the necessity of proving the consideration expressed on its face. Indeed, the presumption that any proof of the consideration was made, is excluded by the declaration of the Court, that the recital of the consideration in the conveyance, was *prima facie* evidence of that fact, and the subsequent statement in the bill of exceptions, that therefore it was read to the jury for that purpose, without *further* proof.

Let the judgment be reversed, and the cause remanded.

THRASH v. SUMWALT.

1. A plea, by an administrator, that before the commencement of plaintiff's suit he had regularly settled the estate with the County Court, and judgment had been therein rendered against him in favor of the distributees, is bad; for the administrator cannot settle with distributees until he has paid all creditors who present their demands within the period fixed by law to bar oustanding claims.
2. When the issue is formed on a replication to the plea of *plene administravit*, and the verdict is for the plaintiff, it will be concluded that the jury have passed

on the quantity of assets and affirmed the allegation of the plaintiff, that more than sufficient assets to pay his demand had come to the administrator's hands, which ought to have been so applied.

3. The statute of non claim [Dig. 153, § 6] creates a complete bar, by the omission to exhibit the demand to the administrator within eighteen months, in all cases not excepted by the statute, whether the administrator does or does not make publication, as required by another section of the same act; [Dig. 180, § 12] and therefore a replication to a plea of *plene administravit* is bad, when it offers an issue upon the fact of advertising.

WRIT of Error to the Circuit Court of Dallas county.

Assumpsit, by Sumwalt against Thrash, as the administrator of Wood, on a note given by the intestate in his life time.

The defendant pleaded,

1st. *Non Assumpsit;* on which there was a joinder.

2d. The statute of non claim, to which the plaintiff replied that the defendant did not make publication in the manner required by law. The defendant demurred, but the Court held the replication good and overruled the demurrer: the defendant then made an issue of fact to the jury.

3d. That before the commencement of the suit, the defendant, as administrator, &c. had regularly made a final settlement of the estate of his intestate before the Orphans' Court of Dallas county; and on such settlement judgment was rendered against him in favor of the distributees for the amount of money remaining in his hands as administrator.

The plaintiff demurred to this plea, and the demurrer was sustained.

4th. *Plene administravit.*

5th. *Ne unques administrator.*

6th. That he was not administrator when the suit was commenced.

If there were any replications to the three last mentioned pleas, they are omitted from the transcript.

A general verdict was returned, assigning the plaintiff damages, but entirely omitting to ascertain what assets remained unadministered. On this verdict a judgment was entered.

The defendant now assigns for error,

1st. That the Court erred in sustaining the demurrer to the third plea.

2d. In overruling the defendant's demurrer to the replication to the second plea.

3d. In rendering judgment on the verdict it, not ascertaining what amount of assets remained in the defendant's hands to be administered.

J. P. SAFFOLD, for the plaintiff in error.

EDWARDS, for the defendant.

[Another cause between McNair and wife v. Chaudron, presenting the principal question, was subsequently argued by R. SAFFOLD, for the plaintiff in error, and EVANS, for the defendant.]

On the second point, and to show that the bar of the statute of *non claim* depends alone on lapse of time, and not upon any act of the administrator, the following authorities were cited:—[Aik. Dig. 153, § 6; ib. 180, § 12; Hazard v. Purdom, 3 Porter 43; Brown v. Anderson, 13 Mass. 201; 15 ib. 7; 16 ib. 198; Bond's heirs v. Smith, 2 Ala. Rep. 660; Jones v. Pharr, 3 Ala. Rep. N. S. 283; McBroom v. Governor, 6 Porter 32; Ware v. Bradford, 2 Ala. Rep. N. S. 675; Acre v. Ross, 3 Stewart 288; Ready v. Thompson, 4 S. & P. 52; Neal v. Cunningham, 2 Porter 191; 6 Conn. 28; 3 N. H. 491; 5 Pick. 140; Hooper v. Bryant, 3 Yerger, 1.]

Against this position, and to show that the bar of the statute depends on the act of publication, the following cases were cited: [Bond v. Allen, C. C. U. S. Martin, 83; Duval's heirs v. McLoskey, 1 Ala. Rep. N. S. 708; Evans v. Norris, ib. 511; Mass. 6; 13 ib. 201; 16 ib, 432.]

GOLDTHWAITE, J.—Some reliance seems to be placed on the points raised by the first and last assignments of error; we shall therefore proceed to dispose of them before considering the more important question growing out of the plea of *non claim*.

1. The third plea we consider to be substantially bad, because the facts alleged by it do not discharge either the defendant, or his intestate's estate, from liability to the plaintiff. An administrator is bound to a creditor in consequence of the assets which come to his hands to be administered; and a distributee has no claim

whatever, until the demands of all creditors are satisfied or legally barred. If then the administrator prematurely settles with the distributees, he does not discharge the assets which may afterwards come to his hands, or himself from liability, on account of those already received. Nor is it any answer to the creditor that a distribution has been decreed by the Orphans' Court. The creditor cannot be forced into that tribunal to litigate any question, either with the administrator or with the distributees, except in case of reported insolvency. In all other cases, he deals with the administrator; and when his demand has been presented within the proper period, it is the duty of the administrator to pay it as soon as the assets of the estate are converted into money.

2. The last assignment of error denies the sufficiency of the verdict to support any judgment whatever; and we understand the plaintiff, in this court, to insist that whenever the plea of *plene administravit* is interposed, there must be a special verdict, ascertaining in terms either that assets more than sufficient to satisfy the demand sued for, remain unadministered; or, if not sufficient, the extent of the assets thus liable to the creditor.

The cases of Booth v. Armstrong, 2 Wash. 301; Rogers v. Chandler, 3 Mumf. 65; Epps v. Smith, 4 ib. 466; Fairfax v. Fairfax, 5 Cranch, 19; and Siglar v. Hayward, 8 Wheat. 675, are cited as decisions of the question now presented. The reasons upon which these decisions rest, are stated by Chief Justice Marshall in Fairfax v. Fairfax, in these terms: "The defendant in error relies on the form of the issue. He contends that as the replication alleges that the defendant has more than sufficient assets to satisfy the debt, the finding of that issue for the plaintiff below, is, in effect, finding the defendant has assets more than sufficient to satisfy the debt; and, if so, it is wholly immaterial what the real amount of assets is. But, if this were the issue, and the demand was five hundred dollars, if the jury should find that the defendant had assets to the amount of four hundred and ninety-nine dollars, the judgment must be for the defendant. But the law is not so; an executor is liable for the amount of assets in his hands and not more: the issue really is whether the defendant has *any*, and what amount of assets in his hands."

This is certainly high authority, but, still, we think it does not meet the case. All that Chief Justice Marshall asserts is true;—an executor or administrator is liable only for the amount of as-

sets which come to his hands; and the issue really is, whether the defendant has *any* and *what amount* of assets in his hands. But when a verdict is returned for the plaintiff, and ascertaining the damages sustained, what reason is there to limit this verdict, and to infer from it that the amount of the assets have not been ascertained?

If the assets which came to the hands of the administrator were not sufficient to satisfy the plaintiff's demand, it clearly was the duty of the jury to say so by the verdict, but they have omitted to do so; they have gone further, and said they find the issue for the plaintiff; it is true this issue consists of two matters: first, whether any assets are yet to be administered; and second, if so, the amount. When then the jury, return a general verdict for the plaintiff, must it not be understood that the finding concludes every matter in issue? In our opinion, such a finding is conclusive, for the reason that we must otherwise consider the jury as having omitted to perform a part of their duty, which was, to inform the Court by the verdict, if the assets were less than sufficient to satisfy the plaintiff's demand. The case of Harrison v. Beckles, cited in 3 Term Rep. 689, on which all the cases seem to rest, if indeed they have any foundation in the practice of the English Courts, only advances the proposition, that an executor is liable to the extent of the assets, and that, verdict in a particular form *may be*, not that it *must be*, returned. Indeed, the direct reverse of this proposition of Chief Justice Marshall is inferable from a fact noticed by Judge Buller, in his opinion in the case of Ewing v. Peters: [3 Term Reporters 686,] when stating the reasons which induced Lord Mansfield, in Harrison v. Beckles to depart from the current of authorities. He says the notion of Lord Mansfield was not a new one, for on looking into the precedents for judgment entries, he finds many such. Now it is scarcely possible that such precedents should be noticed as exceptions, proving the law to be as held in Harrison v. Beckles, if in every case where *plene administravit* was pleaded, the jury were forced, by any issue on it, to return a special, instead of a general verdict. The omission of any remark by judges or commentators, to indicate such as the usual course of practice, is strongly persuasive to show, the rule never was so considered in the English courts. Besides this, the correlative case of a suit against the heir for the bond debt of his ancestor, is precisely

the same in principle, as a suit against an administrator who relies either on the want of assets, or upon the fact of having administered such as came to his hands. In such a suit the heir is only liable to the extent of the effects by descent, and yet we never hear that the verdict in such a case must, necessarily, be special, though it may, and ought to be so, if he has not sufficient to pay the debt, or is entitled to retain for one of his own of equal degree. These reasons and analogies lead us to the conclusion, that when the verdict in such a case as this, is general in its terms, it must be considered as finding every matter contained in the issue, to the utmost extent of the allegations upon which issue is taken.

We have hitherto examined this subject as if the issue was formed upon the most usual replication to the plea; and that we understand to be a very general assertion that assets equal to, or more than sufficient to satisfy the demand sued for, have come to the administrator's hands, which he could, and ought to have applied in discharge of it. There are many other matters which may be replied to this plea, but the defendant having neglected to require a special replication, as under our practice he might have done, he must be considered as assenting that the usual and most general issue should be passed upon by the jury.

Our opinion then is, that a judgment could be, and was properly rendered on this verdict.

3. We come now to the consideration of the remaining point in this case, and it presents the important question, whether the statute of *non claim* attaches as a matter of course to all the demands not excepted by the *proviso*, entirely independent of any act or omission by the administrator or executor of a decedents estate.

It is urged by the plaintiff's counsel, that the general understanding of the profession in this State, has always been, that the bar is conditional only, and does not attach until the administrator or executor has advertised, as directed by the same statute. And it is supposed this Court has recognised, and to some extent, confirmed the opinion of the profession, by assuming a replication similar to the one in this case, as a sufficient answer to the plea.

The opinion of the profession on such a question as this, is certainly entitled to great respect, and we would not lightly disturb a matter considered as settled; but on the other hand, it is denied that such an opinion is by any means general, and perhaps the

most that can be claimed, is that it has, hitherto, never been considered of sufficient importance in any case to be presented for decision in this, as the Court of the last resort. With respect to the supposed confirmation of the propriety of such a replication by a decision here, we can only say that matters may be, and frequently are used in illustration of a question, which on examination may not themselves be able to bear the test of judicial scrutiny. The point to be determined in the case of Evans v. Norris, [1 Ala. Rep. N. S. 511,] was as to the *party* upon whom the *onus* of proof was cast when a *non claim* was pleaded in bar. We held it to be with the plaintiff, as his replication must, if general, assert a presentment within eighteen months; and that in such a case it would be impossible for the defendant to prove a negative. We then proceed to illustrate that view of the case by saying in effect, that the rule would be otherwise, if the plaintiff should reply specially that the administrator did not advertise; for, in that state of the pleadings, he would hold the affirmative. It is claiming too much to argue that a mere illustration is to be considered in the nature of an adjudication.

With these preliminary observations, we shall proceed to examine the statute by which this defence is given.

It provides that "all claims against the estates of deceased persons, shall be presented to the executor, &c. within eighteen months after the same shall have accrued, or within eighteen months after the passing of the act, or within eighteen months after letters testamentary, &c. shall have been granted to the executor, &c. and not after; and all claims not presented within the time aforesaid, shall be forever barred from a recovery; *provided*, that the provisions of this act shall not extend to persons under age, *feme covert*, persons insane, or *non compos mentis*, to debts contracted out of this territory, or to claims of heirs or legatees claiming as such." [Dig. 153, § 6.]

Another section of the same act declares "it shall be the duty of executors, &c. within two months after the granting of letters testamentary, &c. to publish in some newspaper, printed in this Territory, a notice requiring all persons having claims against the estate of their testator, &c. to exhibit the same within the time limited by law, or the same shall be barred; which notice shall state the time of granting such letters, &c. and shall continue to be published for six weeks;" [Dig. 180, § 12.]

The construction of this statute, with respect to other parties than the personal representatives, was incidentally before this Court in the case of Borland v. Darrington; [3 Porter, 9; and McBroom v. Governor, 6 Porter 32,] in which the opinion was expressed that its object was to provide a perfect bar for the benefit of creditors or distributees. We entertain the same opinion now, and as the statute is here directly involved, it is as well to state more fully, the reasons which induce this conclusion.

A distributee, or legatee, before the passage of this act, was entitled to nothing until the debts due from the decedant were discharged, and as these could not be ascertained with any degree of security to the personal representative, until the ordinary period of limitation had run out, it was unsafe for him to settle the legacies or distribute the estate until sufficent time had elapsed to constitute a complete bar, if he chose to insist on it. This, evidently, was the evil which induced this act; and and as it enabled the personal representative to distribute the estate with perfect security; so it likewise confers the right on the distributee to insist that his portion shall not be lessened by any admission of the personal representative. It is emphatically a statute of repose, and as any revival of the liability of the personal representatives would necessarily impede the settlement of estates, such a revival is not permitted to arise out of his admission, nor ought it to be let in by any construction, unless clearly within the intention of the act.

The object of the enactment once ascertained, the construction is free from difficulty. There is a class of creditors whose debts are entirely without the operation of the statute; and there are several classes of persons who are entirely unaffected by it; but with respect to these, it is highly probable that the plea of a full administration, would let in proof by the administrator of a distribution previous to actual notice of the debt. All other debts then due, are completely and effectually barred, unless exhibited within the limited time.

The duty imposed on the executor, &c. to advertise, is as important to the debts and debtors excluded from the operation of the statute, as it is to those whose claims may be absolutely barred, and therefore, nothing can be inferred from the imposition of this duty, to induce the belief, that the bar of the statute was only to apply if the executor performed his duty. In opposition to the

idea that this was intended as the condition of the bar; the exceptions mentioned in the *proviso*, are almost conclusive that none other were contemplated. Besides this, if the bar could be prevented by a culpable omission on the part of the executor, it would result to the delay, not to say injury, of the distributees, who are, as has been shown, the principal persons to derive any benefit from the act. We may add also, that in other states, where similar statutes exist, they are construed as conferring direct rights upon the distributees, which cannot be affected by the admissions of the personal representatives. This is fully shown by the cases cited by the counsel for the plaintiff in error.

It is said, however, that in two of the States where such statutes prevail, the construction is to make the bar depend on the fact that the prescribed notice is given by the administrator. We have examined the statutes of North Carolina and Massachusetts, the States referred to, and find them to be conditional in express terms, and in both these States the bar does not arise until the notice is given. In Tennessee, where the statute is almost identical with that in force here, the same conclusion as our own, was arrived at in the case of Hooper v. Bryant 3, [Yerg. 1.]

Our conclusion is, that the demurrer to the replication to the plea of *non claim* should have been sustained; and therefore the judgment is reversed, and the cause remanded for further proceedings.

BADGER AND CLAYTON v. THE STATE.

1. Where a recognizance taken before a justice of the peace, has been signed and sealed by the principal and his surety, its validity is not affected by the failure to insert the name of the latter in a blank left for that purpose, in the body of it.
2. A statement made by a justice of the peace, preceding a recognizance, which shows the manner of its execution and who are the recognizors, is equivalent to a formal certification of those facts made at the foot of it.
3. A judgment *nisi*, on a recognizance reciting the charge to be the *exhibition of a circus without first obtaining a license according to law*, cannot be supported—

The statute making it indictable to *exhibit a circus for hire, pay, or emolument, without a license.*

4. A judgment may be rendered for the penalty of a recognizance, though this exceeds the amount of the forfeiture which the law imposes, upon a conviction of the offence with which the principal recognizor is charged.

5. The 25th section of the 8th chapter of the act "Regulating punishments under the Penitentiary system," makes the return of "Not found" to an *original* and *alias scire facias*, equivalent to personal service.

WRIT of Error to the Circuit Court of Jefferson.

The plaintiff in error, Clayton, was indicted for exhibiting "for hire, a circus, without obtaining a license from the clerk of the County Court" of Jefferson, and failing to appear, a judgment *nisi* was rendered against him and Badger, his co-plaintiff, who had previously entered into a recognizance with him as a surety; conditioned that he would appear at the Circuit Court, &c. On this judgment an *original* and *alias scire facias* were issued; and the first returned "executed" as to Badger, and both "not found" as to Clayton. And thereupon the following entry was made:—"Came Matthew W. Lindsay, Esq., Attorney General, who prosecutes for the State of Alabama, and the defendant, Jonathan B. Badger, on whom alone process has been served, having failed to show cause why the judgment *nisi*, heretofore rendered, should not be made final:

"It is therefore considered by the Court, that said judgment be made final, and that the State of Alabama recover the costs in this behalf expended," &c.

BAYLOR, for the plaintiffs in error, made the following points:

1. That the recognizance on which the judgment is founded, is void in law.

2. The judgment does not follow the recognizance.

3. The judgment is rendered for a sum greater than the penalty prescribed by law. [Lloyd, et al. v. The State, Minor's Rep. 34; the act of 1837, "The better to regulate the taxing of pedlars and shows."]

4. A judgment could not have been rendered against Clayton; because he was not served with process. [Hayter v. The State, 6 Por. Rep. 156; Whitted v. The Governor, 7 Por. Rep. 335.]

THE ATTORNEY GENERAL for the State.

COLLIER, C. J.—1. It appears from the record that an affidavit was made before a justice of the peace of Jefferson, that Clayton had exhibited a circus for pay, without first obtaining a license from the clerk of the County Court; thereupon a warrant was issued for his arrest, &c. Then follows a recognizance in usual form, save only that the name of the surety is not inserted in its body, and it is not attested by the justice, but is preceded with the following statement: "And on the thirtieth day of November, in the year of our Lord one thousand eight hundred and forty, the said John Clayton, together with Jonathan B. Badger his security, entered into a recognizance before the said Simpson Robinson, esquire, a justice of the peace for the county and state aforesaid, in the words and figures following, to-wit."

We do not regard the case of Lloyd and others v. The State, as an authority adverse to the sufficiency of the recognizance. The objection there was, that the bond of the plaintiffs in error, was not authenticated, so as to inform the court, that it was taken as a recognizance, before any officer authorized by the law for that purpose.

In Howie & Morrison v. The State, [1 Ala. Rep. N. S. 113,] it was held that a recognizance was properly certified, which commenced thus—"Be it remembered, that on, &c., came, &c., before me, &c., a justice of the peace in and for the county, &c., who acknowledged themselves, &c.," and at the foot was approved by the justice.

The certificate of the justice affirms, that the recognizance in the present case had been entered into by the principal and surety, before him. This we regard a substantial compliance with what was adjudged necessary and sufficient in the cases cited. The object of the recognizance must have been to effect what its terms indicate, and being signed and sealed both by the principal and surety, cannot be held to be invalid as to the latter, because his name was not inserted in the blank left for that purpose in its body. It sufficiently appears from the manner of the execution, and the statement of the justice who are the recognizors; and a formal attestation at the foot would not have imparted any additional validity, or authenticity to the recognizance.

The condition of the recognizance required that Clayton should appear at, &c. "to answer a charge of the State of Alabama, exhibited against him for exhibiting a circus for pay, without first

obtaining a licence from the clerk of the county court, &c." The judgment *nisi* recites, that Clayton "being solemnly called to come into Court, as he was this day bound to do by his recognizance, to answer a charge of the State of Alabama exhibited against him for exhibiting a circus without first obtaining a licence according to law, came not, but made default;" that Badger being called to bring into Court the body of his principal, as he was bound to do by his recognizance, failed, &c. Then follows a judgment against both of the recognizors, for the sum of four hundred dollars, the penalty of the recognizance.

This proceeding was instituted under the third section of the act of 1837, "The better to regulate the taxing of pedlars and shows." That section requires, that every person who shall exhibit any circus, &c., for hire or emolument, shall first obtain from the clerk of the County Court of the county where the exhibition shall take place, a licence authorizing the same: and further, "every person who shall exhibit as aforesaid, without first obtaining such licence, shall forfeit and pay the sum of two hundred dollars, to be recovered by indictment in the Circuit Court of the proper county, for the use of the proper county, &c."

The offence denounced by the statute, though not literally, is yet described with sufficient accuracy in the condition of the recognizance; but the judgment does not show that the principal recognizor was called, or his surety required to bring him to answer for any offence known to the law. It does not state the charge to be the exhibition of *a circus, for hire, pay, or emolument*, but *a circus, without first obtaining a licence according to law*. Now it may be strictly true, that a circus was exhibited, and no penalty incurred; for to make such an act punishable, it is necessary that the person who did or caused it to be done, should have received hire, &c.

In Howie & Morrison v. The State—*Supra*—it was held not to be necessary to recite the entire recognizance in the judgment *nisi*, but it should be stated, that the accused was required to answer the charge which his recognizors had stipulated he should answer; this is necessary to show a breach of the recognizance, without which it would not be forfeited. If the accused is required to answer a charge variant from that described in the condition of the recognizance, this will not show a breach; and a forfeiture in such a case is not provided for, and a judgment *nisi* cannot

be supported. It is essential therefore to ascertain if the record shows, that the accused was required to answer the charge specified in the recognizance."

Further—"If a suit was instituted on a bond with a like condition, and the breach was alleged in the same manner as in this judgment *nisi*, the declaration would be bad on demurrer; as much certainty is required in the judgment *nisi*, as is requisite in showing a breach of a contract in an action of debt; and as this is not shown in the present case, the judgment is erroneous."

This decision seems to us to be conclusive of the case at bar, and shows the necessity of a substantial conformity of the judgment to the recognizance. And it may be added, that the judgment is not only defective for a mis-recital of the charge against the principal recognizor, but as the *scire facias* can only be sustained by a valid judgment, it is defective in not stating any legal charge.

In respect to the third and fourth points, made by the counsel for the plaintiffs in error, it may be remarked that they are not well founded. The judgment is rendered for the amount of the recognizance, and nothing more, and that is only double the amount of the forfeiture which the statute imposes for the offence. There is no complaint that the penalty is excessive, and if there was, we cannot conceive how it could be redressed on error.

It is enacted by the twenty-fifth section of the eighth chapter of the act "Regulating punishments under the Penitentiary System," "Where an original and *alias* writ of *scire facias* issued upon a judgment *nisi*, rendered at the instance of the state, upon a forfeited recognizance, shall be returned 'not found,' such return shall be equivalent to the personal service of the process, and authorise the Court in which the judgment *nisi* was rendered, to make the same absolute: *Provided*, that such writs shall have been returned by the proper officer of the county, in which the forfeited recognizance shall have been entered into or acknowledged." This enactment is of a recent date, and abrogates the decision in Hayter v. The State, which was cited for the plaintiffs, and shows that it is not indispensable to the regularity of the proceeding, that process should be personally served on the parties.

The result is, that for the insufficiency of the judgment *nisi*, the confirmatory judgment cannot be sustained; it is consequently reversed, and the cause remanded.

SMITH, *et als.* v. THE BRANCH BANK AT MOBILE.

1. The result of all the cases in this Court, upon summary judgments rendered on motion is, that when the judgment is by *default*, it must appear by the judgment of the Court, that the defendant had the notice which the law requires, and that the facts were proved, which gives the Court jurisdiction and shows the liability of the defendant for the debt or penalty. If the defendant appear, it will be evidence of notice, and if an issue is made up and submitted to a jury, it is then like any other cause commenced in the ordinary mode, except that it must appear upon the record, that the Court had jurisdiction to entertain the motion.
2. When the record shows that the jury passed upon an "issue joined," if it does not appear from the record what the issue was, this Court will intend that it was an issue formed upon the proper plea.
3. The Bank may maintain an action in its own name, on a note payable to A. Armstrong, cashier, upon an averment that it was made to the corporation by that name.
4. When the caption of the record showed that the court was held on the 2d Monday of February 1841, a memorandum at the head of the judgment entry of "March 17th 1840," will be considered a clerical misprision and amended by other parts of the record.

ERROR to the Circuit Court of Mobile.

This was a summary proceeding, by motion of the defendant against the plaintiffs in error—the following is the judgment entry:

Branch Bank, *vs.* Daniel Smith, Calvin S. Powe, A. K. Smith. } 17th March, 1840,

This day came the parties by their attornies. The motion for judgment was made in the cause on the second Monday of the term. The plaintiff producing a note, dated the 25th of May 1838, payable nine months after date, to the said bank, by the name of Andrew Armstrong, cashier, or bearer, for the sum of one thousand dollars (of which one hundred has been paid,) negotiable and payable at the Branch of the Bank of the State of Alabama at Mobile, and produced the certificate of John B. Norris, President of said Bank, that the same is really and *bona fide* the property of the said Bank, and was when

the same was protested. The facts before stated being shewn, this motion was continued until this day, and thereupon came the defendants and pleaded to this motion; and the plaintiff having filed a replication to the second and third pleas of the said defendants, the defendants demurred thereto, and the demurrer being argued and considered, it is considered by the Court the second and third pleas are insufficient in law, and that the plaintiff is not bound to answer the same; and thereupon, came a jury, to wit, &c. who being sworn, well and truly to try the issue joined, upon their oaths do say, we the jury, do find for the plaintiff, and assess the damages at one thousand and forty-nine dollars eighty cents. It is therefore considered by the Court, that the plaintiff recover against the defendants the said sum, &c.

The assignments of error are,

1st. The service of notice is not sufficient.

2d. It no where appears that any note was produced, made by the plaintiffs in error, or either of them.

3d. It does not appear that Andrew Armstrong endorsed the note to the plaintiff.

4th. It was error to assume, as the plaintiff does in the motion, that the note was made to the plaintiff by the name of Andrew Armstrong, and required his endorsement to sustain this summary remedy.

5th. The record is uncertain and does not shew certainly when judgment was rendered, but appears to have been rendered the 17th March 1840, and not in the year 1841.

6th. It does not appear that any of the defendants, or which of them, joined issue; nor what it was that was found by the jury—nor that such issue authorized a judgment in this summary proceeding.

7th. The Court erred in strking out the pleas, and in sustaining the demurrer to the second and third pleas.

8th. The judgment is uncertain and insufficient, and does not shew who was the plaintiff, or who the defendant, with certainty.

Stewart, for plaintiff in error.

Campbell, *contra.*

ORMOND, J.—It appears from the objections taken to judgments of this character, that our decisions on this class of cases,

are but imperfectly understood, it may therefore, not be improper that we should again state the result of the cases to be found in our books.

When the judgment rendered on motion is by default, it must appear by the judgment of the Court, that the defendant had the notice which the law requires, and that the facts were proved which gives the Court jurisdiction of the case, and shows the liability of the defendant for the debt, or penalty, sought to be enforced. If the defendant appear, it will be evidence of notice; and if an issue is made up between the parties and submitted to a jury, it is then like any other cause commenced in the ordinary mode, except that it must appear upon the record that the Court had jurisdiction to entertain the motion.

In this case, there was an issue made up between the parties and submitted to a jury; and it also appears from the judgment entry that the Court had jurisdiction. This disposes of all the assignments of error which question the sufficiency of the notice, and the liability of the defendants for the debt, the former being cured, if defective, by the appearance, and the latter ascertained by the verdict of the jury.

It is true, that it does not appear what the issue was which was tried by the jury, but it does appear that the "jury upon the issue joined, found for the plaintiff and assessed the damage at one thousand forty-nine dollars eighty cents." It is then clear that the issue was one which tested the liability of the defendants for the debt, and according to the decision of this Court, in Lucas v. Hitchcock, [2 Ala. Rep. 287,] we must intend that it was an issue formed upon the proper plea. The tendency of our decisions for some years, has been to presume that those acts have been done which although they do not appear upon the record, are supposed to exist, by what does appear, or else were waived by the parties at the trial; any other supposition indeed falsifies the record.

It is also supposed that the recovery is wrong, because the note on which it was had, was payable to *Andrew Armstrong, cashier*, and does not appear to have been assigned to the Bank by him. In the case of McWalker v. The Branch Bank at Mobile, [3 Ala. 153,] we held, that the Bank could recover on such a note, by averring that it was made to the corporation by the name and description of Andrew Armstrong, cashier. Such is the aver-

ment in this case, and its truth is affirmed by the verdict of the jury.

Whether the Court erred or not, in striking out the pleas and sustaining the demurrer of the plaintiff, as stated in the record, we have no means of determining, as the pleas are not found in the record. If it had been intended to revise the judgment of the Court in this matter, the facts should have been presented by bill of exceptions, or in some mode spread upon the record.

The remaining question is, whether the judgment is void, as alleged, for uncertainty. It is supposed to be uncertain, because the parties are not named in the judgment. They are recited by name at the head of the judgment entry, and to that recital the terms "plaintiff" and "defendants" in the judgment of the Court must be referred. The *time* when the judgment was rendered is shown by the caption of the record, by which it appears that the Court was held at a term commencing on the second Monday of February 1841. The memorandum at the head of the judgment entry, in the words and figures, *March* 17, 1840, is doubtless a clerical *misprision*, and by the operation of the statute of *jeo fails*, is amended by the other parts of the record showing the true date.

It results from this examination, that there is no error in the judgment of the Court, and it is therefore affirmed.

WRIGHT, AND OTHERS, v. BURT.

1. When a debt is contracted in one beat, and afterwards a note is given for it in another, the acceptance of the note does not exempt the maker from being sued in the beat where the debt was contracted.
2. When a cause is at issue and before the jury for trial, it is erroneous for the Court to overrule a plea properly pleaded, but not sustained by the evidence. The proper course is to instruct the jury with respect to the law, and leave them to apply it to the facts which they shall ascertain.

WRIT of Error to the Circuit Court of DeKalb county.

Two suits upon promissory notes made by the defendants

Wright and Clayton, and another person, were commenced in a justices court.

The defendants removed the judgment rendered there against them into the County Court, by *certiorari*. The suits were there consolidated, and the defendants pleaded to the jurisdiction of the Court, that they had been sued in a different beat from that in which they resided, and not in the one where the debt was contracted. This plea is not drawn out in form, and it is stated upon the record to be pleaded in short, by consent of the parties.—The plaintiff demurred to this plea, but the Court sustained it. An issue was then formed to the jury, which resulted in a verdict for the plaintiff, who had judgment.

A bill of exceptions was sealed, at the instance of the defendants, by which it is shown that they proved the notes were executed in the beat where they resided, which was not the beat in which they were sued. The plaintiff then offered evidence showing that the debt for which the notes were given, was contracted in the same beat in which the suits were commenced. This evidence was objected to by the defendants, but admitted by the Court; which thereupon "determined that the debt was made in the beat where the suits were brought, and by the delivery of the property for which the notes were given," overruled the defendants' plea, and required them to plead over.

The defendants excepted as well to the overruling of the plea, as to the admission of the evidence objected to.

The cause was taken to the Circuit Court, where errors were assigned upon the bill of exceptions, and the judgment was affirmed against the defendants and their sureties on the error bond. This judgment is now assigned as error, and the same questions are raised as were in the Circuit Court.

Rice, for the plaintiffs in error.
Stone, *contra*.

GOLDTHWAITE, J.—1. When a demand is cognizable by a justice of the peace, the statute requires the defendant to be sued either in the beat where he resides, or in the one where the debt was contracted. [Digest, 293, § 8.]

We think by this act the plaintiff is allowed the privilege of sueing his debtor in the beat where the debt was created. The

note is only the evidence of the debt, and may havebeen given at a different place from that where the contract was made and perfected by the delivery of the thing sold. In our opinion there is no error in the decision of this point.

2. With respect to the overruling of the plea, we think it very possible there is some mistake; but we must be governed by the bill of exceptions. That states, that the Court, after the evidence was given, overruled the plea, and required the defendants to plead over; this was erroneous, because the defendants thereby were precluded from contesting the question of fact before the jury. The plea having been received without being put in form, must be considered as presenting all the allegations necessary to bring the defence within the statute; and therefore could not be overruled by the Court. The proper course would have been to instruct the jury, if the evidence for the plaintiff was believed, they ought to find for him, as the plea under that evidence was not sustained.

The judgment of both Courts must be reversed, and the cause remanded.

DENSLER, EX'R, &C. v. EDWARDS, USE, &C.

1. It is not sufficient to establish the interest of a witness, to show that he had told a third person, that one half of the debt for the recovery of which the action was brought, was coming to him (witness) and under his control; such proof does not exclude the inference that his right to receive the money and control the suit, was not as an attorney or agent.
2. Where one takes possession of goods left by a deceased person, under a claim which is colorable and fair, he is not liable as an executor *de son tort.*
3. A person who is in possession of goods, after the donor or grantor's death, under a fraudulent deed of gift or other conveyance, in respect to such goods, he is chargeable as an executor *de son tort.*
4. Where a person takes possession of the property of a decedent in one State, under circumstances which would there render him liable as an executor *de son*

tort, and removes it, or sells it, and removes without accounting for the money, he may be sued in that character wherever he is found, even in another jurisdiction.

WRIT of Error to the Circuit Court of Macon.

The defendant in error declared against the plaintiff, in *assumpsit*, on a promissory note made by his testator and two other persons, on the fourth of February, 1837, for the payment of one thousand dollars, on or before the twenty-fifth of December, 1838. The cause was tried on an issue to the plea of *ne unques executor*. On the trial the defendant below excepted to the ruling of the presiding judge. The bill of exceptions states, that the plaintiff offered to read to the jury, the testimony of one Hansell, to prove that the defendant, after the death of Henry Densler, whose executor he was charged to be, intermeddled with the goods of the deceased; whereupon the defendant introduced the deposition of one Robert Densler, who testified that Hansell "told him, that one-half of the debt sued for was coming to him and under his control;" and then moved to exclude Hansell's deposition from the jury, on the ground of interest. But as it appeared that defendant had cross-examined the witness, and asked him whether he was interested in the event of the suit, and in answer to such question he denied that he had any interest; the objection to the deposition was overruled, and the same was read to the jury.

The plaintiff then adduced two witnesses, who testified that Henry Densler, the deceased, died in Baldwin county, in the State of Georgia, in the latter part of 1838, or begining of 1839; that before and at the time of his death, he was in possession of property of the value of forty-five hundred dollars; which, after that event, was sold by the defendant, in Georgia.

The defendant offered in evidence two bills of sale for the property sold by him, made by the deceased, and dated the 29th of January, 1838; which bills of sale professed to convey the property to the defendant, in consideration of forty-five hundred dollars paid by him. He also introduced several witnesses, who stated that at the time of the sale by the deceased, he (defendant) took possession of the property, and retained it until he sold it.

The plaintiff then offered evidence tending to prove, that the conveyance by the deceased to the defendant, was made to defraud the creditors of the former.

There was no proof that any part of the estate of the deceased, had been removed from Georgia to this State, by the defendant, or that the latter had intermeddled with the property in this State.

On this state of facts, the defendant moved the Court to charge the jury,—

1. That if they believed from the evidence the defendant took possession of the goods sold by him, on a claim of property, although it should afterwards appear that he had no right to them, such interference did not make him liable as an executor *de son tort.*

2. If the defendant took the goods under a bill of sale from the deceased, although that bill of sale may have been fraudulent, yet the taking did not make the defendant liable as an executor *de son tort.*

3. If the property was taken by the defendant in the State of Georgia, and there disposed of, he cannot be charged here, because of such intermeddling with the property of the deceased in Georgia.

Which several charges the Court refused to give; but instructed the jury, that if defendant took possession of the goods of the deceased under fraudulent conveyances, he was liable as executor *de son tort.*

Belser, for the plaintiff in error. The deposition of Hansell should have been excluded: his interest was sufficiently shown. [1 Phil. Ev. 131–2; 1 Dallas' Rep. 272–5; 5 Conn. Rep. 258–261; 3 Porter's Rep. 279.]

The possession, by the defendant below, of the goods of the deceased, although the bill of sale under which he claimed, was fraudulent, did not make him an executor *de son tort.* [1 Root's Rep. 104; 1 Dev. Rep. 139; see 1 Ala. Rep. N. S. 237–273; 1 Esp. Rep. 335; 1 Tenn. Rep. 300; 2 Starkie on Ev. 583.]

The defendant is not chargeable as an executor *de son tort,* upon proof of intermedling in Georgia, but it should be shown that the goods of the deceased were removed to this State.—[Story's Conf. of Laws, 421, 2d ed.] The case in 7 Cowen's R, 64, on this point, cannot be sustained. The case in 7 Johns. Rep. 161, lays down a more reasonable rule.

Peck, for the defendant in error. If a person make a gift or

fraudulent sale of his goods, to the prejudice of creditors, and die, the donee or vendee by disposing of them thereafter, becomes liable as an executor *de son tort*. [1 Wms. Ex'r, 139, and note,]—So a person may become an executor *de son tort*, by buying at sheriff's sale goods of an intestate, sold under an execution issued on a judgment confessed in his favor, by intestate, to defraud creditors. [7 Johns. Rep. 161.]

The only claim which the defendant below pretended to have, was under the fraudulent bills of sale, and if the first charge prayed does not refer to these, then it was abstract, and was properly refused. If he claimed under the bills of sale, the question of the intention with which they were made and received, was properly referred to the jury.

If a person intermeddle with the goods of a deceased person, sell them in one State and have the money in another, he may be sued as an executor *de son tort*. [7 Cow. Rep. 64–7.] If the defendant below, sold the goods in Georgia, and removed to this State, the legal presumption is, that he had the proceeds of the sale with him in this State; and he is accountable for them in the form of action which has been adopted.

The testimony offered to show the admissibility of Hansell's deposition, is so vague, that it does not establish such a certain legal interest as renders a witness incompetent.

COLLIER, C. J.—1. The first question which presents itself is, was the testimony of plaintiff's witness, Hansell, properly admitted? The admissibility of his evidence depends primarily upon the fact, whether he had such an interest in the event of this cause as rendered him an incompetent witness. It may be regarded as a settled rule, that competency is always presumed until the contrary is shown. [Hall v. Gittings, 2 Har. & Johns. R. 112; Stoddard v. Manning, 2 Har. & G. Rep. 147; Callis v. Tolson's ex'rs, 6 G. & Johns. Rep. 80; Saxton v. Boyce, 1 Bail. Rep. 66; Smith v. White, 5 Dana's Rep. 382; Howell v. Delancy, 4 Cow. Rep. 427.] And the burthen of establishing that a witness is incompetent, lies on the party who makes the objection. [Marsden v. Stansfield, 7 B. & C. Rep. 815; Watts v. Garett, 3 G. & Johns. Rep. 355.] The evidence, of Hansell's interest, in the event of the suit, is not his own admission, made under oath, but the testimony of a third person, who declares that the

witness told him, that one-half of the debt for the recovery of which the action was brought, "was coming to him (witness) and under his control." These words are of very indefinite import, leaving it to be conjectured in what character the money was coming to him, and for whose benefit he controlled the suit. So far as information is imparted by the bill of exceptions, it is quite as fair to infer, that the witness was acting as an attorney or agent for another, as, that the interest of which he spoke, was personal. To presume the latter, would be to incline most favorably to his incompetency, which we have seen is inhibited by an established rule of law. In the manner in which the evidence of interest is stated upon the record, we think it proves nothing to warrant the exclusion of the deposition. True, the Circuit Court did not place the refusal to reject the evidence, upon the ground that there was not sufficient proof of interest in the witness; but held it inadmissible to adduce evidence to the point, after the witness had disavowed any interest in the suit, upon being cross-examined by the defendant. Whether the reason given for the opinion of the Court, is correct, we need not inquire; the conclusion upon the question submitted, was in conformity to law, and the reasoning by which it was attained has worked no prejudice.

2. It is not pretended, that the defendant was the rightful executor of the deceased debtor of the plaintiff's, but it is contended that he so interfered with the personal property of the deceased, as to make himself liable as an executor *de son tort*. It is laid down generally, that the taking of goods of an intestate, or any intermeddling therewith by a stranger, will, as respects creditors, make him executor *de son tort*, and chargeable at least so far as assets have come to his hands. It is not however, every act of intermeddling, which will charge a man as an executor in his own wrong; if the interference is merely conservative, no such consequence will result from it. [1 Wms. on Exs. 139, 140; 1 Lomax on Exr. & Admr. 77.] So it is said, if a person sets up in himself a colorable title to the goods of the deceased, as where he claims a lien upon them, though he may not be able to make out his title completely, he will not be deemed an executor *de son tort*. [1 Lomax on Exr. & Admr 77:] and in Ferrings v. Jarratt, [1 Esp. Ca. 335,] the Court say that one who takes possession under a fair claim of right does not acquire that character.

The first charge prayed by the defendant, supposes that a

mere claim by him to the property which he sold, however groundless or unfair would relieve him from a suit as an executor in his own wrong, by a creditor of the deceased. Such it is true are not the terms employed, but it is their meaning when legally interpreted. This charge was very properly denied. The law, as we have stated it, is quite as favorable for the defendant as we find it laid down in any of the books; and it requires that the claim under which possession is taken of the goods left by a deceased person, shall be at least colorable, and fair. By this we are to understand that there is some pretence for its assertion, and that the party setting it up, was influenced in his acts by fair and honest intentions.

3. It has been repeatedly holden, that where one is in possession of goods after donor or grantor's death, under a fraudulent deed of gift, or other conveyance made to him, he is chargeable in respect to such goods as an executor *de son tort*. Thus, where the inestate had confessed a fraudulent judgment to defeat his creditors, and his goods were bought by the judgment creditor under a sale on the execution, it was considered as clear, that a creditor might maintain an action against such fraudulent vendee as an executor in his own wrong; although the administrator could not impeach the judgment: [Osborne v. Moss, 7 Johns. Reps. 161; Rattoon, et al. v. Overacker, 8 ib. 97,] see also Dorsey v. Smithson, 6 H. & Johns. Rep. 61; Edwards v. Harbin, 2 T. Rep. 587.] So also where the deceased in his life time, in fraud of his creditors, had made a donation of his effects to his children, it was held that a creditor who had recovered a judgment against his administrator, might file his bill in chancery against the donees and against the administrator *de bonis non* of the deceased, the administrator being dead. For in the case of fraudulent conveyances, the donee in possession, is an executor *de son tort*, although there be a rightful executor or administrator. The reason of which is, that the donee cannot be made responsible for the property, to the rightful representative, the gift being valid as against the parties, and as against persons not creditors. If the donee were not liable as an executor in his own wrong, the property could not be subjected to the payment of the intestate's debts; for the gift, though fraudulent, could not be set aside by the donor or his representative; [1 Lomax Exr. & Admr. 79, and cases cited in note; Chamberlayne v. Temple, 3 Rand. Rep.

384.] These authorities are decisive to show, that the second charge prayed should not have been given, and rest upon reasoning too strong to be impaired by the only opposing adjudication to which we have been cited, viz: King v. Lyman, 1 Root's Rep. 104. The sole ground there, upon which the Court determined that one holding goods under a fraudulent bill of sale was not liable as an executor *de son tort* was, that the conveyance, though fraudulent as against creditors, was valid as between the parties. The insufficiency of the foundation which sustains the case, is too well shown by Chamberlayne v. Temple, to require further notice. Movrill, adm. v. Movrill's exr. [13 Maine Rep. 415,] is entirely unlike the case before us. There, it appeared that a father made a voluntary conveyance of real and personal property to his son, and the son during the life time of the father, sold and disposed of all the personal property so conveyed to him: the Court held, that as it did not appear the defendant had interfered with any property which belonged to the intestate at the time of his death, he could not be charged as an executor in his own wrong.

4. It may perhaps be regarded as settled, that letters testamentary, or of administration, have no efficacy *extra territorium:* and that consequently an executor or administrator in virtue of a foreign probate or administration, has no capacity in other countries to sue or be sued; [Lomax' Ex. & Admr. 119–241; Story's Conf. of L. 421, and cases cited in Note.] But the liability of an executor *de son tort*, to be sued in whatever country he may found, without reference to the jurisdiction in which the intermedling with the goods of the deceased first took place, is a very different question. Mr. Justice Story says, if an executor or administrator go into a foreign country, and without there administering, collect effects and debts of his testator or intestate, found or due there, it would seem upon general principles he would be liable as an executor *de son tort.* [Story's Conf. of L. 424.] If he would be thus chargeable, though he had administered abroad, he could not occupy a more favorable position if it were shown that he had not been authorised by a foreign tribunal to take possession of the estate of the deceased. In Campbell v. Tonsey, [7 Cow. Rep. 64,] the Supreme Court of New York, went so far as to hold, that although an executor or administrator appointed in a neighboring State cannot be sued as such in New York, yet if he collect the effects of his testator and bring them there,

he may be sued as an executor in his own wrong. Whether this case lays down the law too stringently, we will not stop to inquire; for whether it be defensible or not, we think it clear upon principle, that a person who takes the property of a decedent in one State, and there sells it without legal authority, and removes to another, without having disbursed the proceeds in payment of debts, or otherwise legally accounted for them, is chargeable as an executor *de son tort*. He must, under such circumstances, be regarded as carrying the money with him wherever he goes; and as the title has never vested in him, he is liable to the creditors of the intestate, or the rightful representative for the amount wherever he may be.

This view of the case is decisive of the questions raised upon the record, and our conclusion is, the judgment must be affirmed.

RASCO & BRANTLEY v. WILLIS.

1. In the hiring of slaves there is an implied stipulation that the slave is to be employed in some honest pursuit, and if the hirer should incite or compel the slave to steal, or become the receiver of stolen goods, the owner would have the right to rescind the contract, and resume the possession of his slave.
2. In such a case the hirer would be responsible only for the actual value of the services rendered by the slave, estimated by the contract previously made.
3. Evidence that the defendants kept a small grog-shop, about which negroes resorted, with other circumstances conducing to show that an unlawful traffic was carried on by them with slaves, by receiving from them stolen goods, is not proper to go to the jury, to prove that the defendants, and other persons with their permission, incited the slave of the plaintiff to steal, or employed him as an instrument in their unlawful traffic, without further proof, in some way connecting the slave of the plaintiff with these unlawful acts.

ERROR to the Circuit Court of Dallas.

This was an action commenced before a justice of the peace, on a note of the plaintiffs in error, under fifty dollars; and judg-

ment being rendered in favor of the defendant in error, an appeal was prosecuted to the Circuit Court.

Upon the trial of the cause in the Circuit Court, it appeared in evidence that the note sued on, with several others, was given by the plaintiff in error, Brantley, for the hire of a negro man slave, for one year from the first of January, 1841 to the first of January, 1842. That the slave went into the possession of Brantley at the time of hiring and continued in his possession until the 13th of November, 1841, when the plaintiff with five or six other persons, came to the house of Brantley, and took the slave from him without his consent. The plaintiff proved that he had entered a credit on one of the notes for twenty dollars, for the unexpired term of the hiring, but it was without the knowledge or consent of Brantley.

The plaintiff then offered to prove, as a justification for taking away the negro, that Brantley was employing him to steal property, or that his father and brother were doing so, with his consent; to which the defendant objected; but the Court permitted the proof to be made.

The plaintiff then proved what business the defendant and the other Brantleys carried on together, and that it was a poorly furnished grog shop, about which negroes resorted, with other circumstances, conducing to show that an unlawful traffic with slaves was carried on; and other circumstances tending to show that the Brantleys were in the habit of receiving stolen goods from negroes, knowing them to be stolen, and that these circumstances had been detailed to the plaintiff with advice to take the negro away. This testimony was objected to by the defendant; but the Court permitted it to go to the jury.

The Court then charged, that if the defendant, or others with his consent, employed the slave to steal goods, or in receiving or bringing stolen goods to them, it furnished a sufficient legal excuse to the plaintiff to terminate the contract, and take the slave, and recover in this action for the time the defendant had the slave in his possession. To all which the defendant excepted, and now assigns for error the matters of law arising out of the bill of exceptions.

Evans, for plaintiff in error—Contended that the contract was entire, and that the contract of hiring was a sale of the services of

the slave for one year, and as the slave was taken away before the expiration of the year, without the defendant's consent, there could be no recovery. [3 Ala. Rep. 440.] That the plaintiff was sufficiently protected from any injury to his slave, by the criminal law.

EDWARDS, *contra*—Insisted that the contract contained implied stipulations, as well as express. That employing the negro to steal, was not only impairing his morals, and thereby his value to his owner, but was also putting his life in peril. That this was a violation of his contract, and put an end to it, and the master had then a right to resume possession of the slave.

He also maintained, that as there was a written promise to pay the consideration, that the covenants between the parties were independent, and that the plaintiff might recover the whole hire, and leave the defendant to his cross action. He cited 9th Porter, 74.

ORMOND, J.—The counsel for the plaintiff in error contends, that as the contract for the hire of the slave was entire, and was put an end to by the defendant in error without his consent, there can be no recovery even for the services rendered by the slave.

The general rule is certainly as stated, but it is equally as clear, that in all contracts of this description, there are certain implied stipulations, the violation of which will authorize a rescision of the contract. When a slave is hired, it must be implied that he is to be employed in some honest pursuit, and if the hirer should incite him to steal, or compel him to become the receiver of stolen goods, it cannot be doubted that the owner would be authorized to rescind the contract of hiring. The injury to the morals of the slave by thus becoming familiarized to the commission of crime, would not only impair his value as property, but in its consequences might lead to the loss of his life.

It is no answer to this view of the case, that for any injury to the slave, the hirer could be compelled to respond in damages; he might not be able to satisfy the judgment; and besides, it would be difficult, if not impossible, to admeasure by damages, the amount of injury inflicted on the owner, by debauching the morals of his slave. If, in the downward career of vice, in its progress from the commission of one crime to that of another of deeper dye, the slave should finally be guilty of an act which would forfeit his life, it would be impossible to trace the consummation of his guilt to

his initiation in crime, by the defendant. For injury of this kind, therefore, in the very nature of the thing, there could be no adequate redress by action, and we are therefore of opinion, that it would justify the owner in rescinding the contract, after which period his right to hire for the services of the slave, would of course cease, and the hirer become responsible only for the actual value of the services rendered, estimated by the contract entered into.

The next enquiry is, whether the evidence objected to by the plaintiff in error was properly admitted. It was in substance, that the Brantleys kept a small grog shop, about which negroes resorted, with other circumstances, conducing to show that an unlawful traffic with slaves was carried on by them, and also that they were in the habit of receiving stolen goods, knowing them to be stolen.

The facts which the plaintiff undertook to establish as a justification for his rescision of the contract, were that the defendant, and other persons with his permission, incited the slave to steal, and employed him as an instrument in their unlawful traffic of receiving stolen goods, The circumstances in proof may have tended to the conclusion, that the Brantleys carried on this unlawful traffic with slaves, but there is no evidence which in any manner connects the slave of the plaintiff with these transactions. A suspicion might indeed be indulged in, that a person who would trade with one slave unlawfully, would also with another; but the inference which appears to have been drawn in this case, is more violent than this: it is, that a person who would purchase stolen goods from negroes generally, would employ a particular slave as his instrument in the commission of the crime; and not only this, but that he would incite, or in the language of the bill of exceptions, employ him to steal.

As the facts offerred in evidence did not tend to prove the issue, but by violent and strained presumptions, which the proof did not legitimately warrant, it follows that the facts in proof were too remote and irrelevant to the issue between the parties to have been permitted to go in evidence to the jury, without some further proof, in some way connecting the slave of the plaintiff with these unlawful acts of the defendants, and could only tend to prejudice and mislead the jury.

For this error the judgment must be reversed, and the cause remanded.

SIMMS v. NORRIS & CO.

1. An infant is not personally liable, even for necessaries, when they are supplied to her by a store keeper with the permission of her guardian, and charged to him, although the credit given to the guardian may have been induced by the fact that the ward had an estate of her own, and with the expectation that the debt would be paid out of it. The contract is personal to the guardian, and his liability cannot be shifted to the infant.

WRIT of Error to the Circuit Court of Dallas county.

This case was carried by appeal, from a Justice of the Peace to the Circuit Court, which gave judgment for the plaintiff upon this state of facts.

The defendant is a minor, and was living under the control of a guardian duly appointed over her. She went to the store of the plaintiffs in company with her guardian's wife, and purchased some articles, necessary and suitable to her condition in life. These were charged to the guardian, as other articles of a similar kind, previously had been purchased and paid for. The plaintiffs gave credit to the guardian upon the faith of his ward's estate, and with the expectation of being paid out of it. The goods thus credited, were never paid for by the guardian, who afterwards resigned, and settled his guardianship accounts with the County Court. In this settlement, he charged his ward with a gross sum for expenditures, maintainance, &c. but the proof did not show that this account was enumerated in the charge. There was no evidence that the guardian had ever failed or refused to supply his ward with the articles necessary and suitable for her condition in life.

The judgment of the Court is assigned as erroneous.

EDWARDS, for the plaintiff in error.
EVANS, *contra.*

GOLDTHWAITE, J.—As we understand the case, no question arises out of its facts, as to the nature and extent of the liability of an infant for necessaries furnished; because, in point of fact,

no credit whatever, was given to the infant, but the goods were supplied solely upon the credit of the guardian, and were charged to him. The circumstance that the credit was induced by the fact that his ward had an estate of her own, from which the payment was expected to come, cannot change the character of the contract. The guardian is personally responsible to the plaintiffs, and his refusal or inability to pay, cannot shift the responsibility upon the infant.

If she could be held personally liable, under the circumstances of this case, every infant will be liable for the necessaries furnished for its support, although the guardian may have misapplied the estate committed to his charge for that very purpose. It is very possible that the account now sued may have formed some part of the charge made by the guardian when he settled with the County Court; but, conceeding such is not the fact, it cannot shift the liability under the contract, from the guardian to his ward, or in any manner render her liable for the debt.

The judgment must be reversed, and if desired, the cause will be remanded.

WOOD v. GARY, ET AL.

1. Where different creditors claim a priority of lien for their respective executions, and one of them moves against the sheriff and his sureties, so as to coeree an appropriation of the money to the satisfaction of his *fi. fa.* although the other creditor may have the prior lien, yet the party submitting the motion is entitled to a judgment for the excess of money in the sheriffs hands. But, if the plaintiff in such case have returned the facts specially to the Court, and asked its direction thereupon, he will be relieved from the payment of damages and interest.
2. A writ of *fieri facias* being returnable to the first Monday in April, the direction of the plaintiff to the sheriff on the 25th March preceding, to return it, will not render it *dormant*, or impair its *lien*, as it respects an execution of a junior judgment creditor subsequently issued, unless such return was made when the exe-

cution might have been satisfied and with interest to favor the defendant in execution.

3. An *alias* issued upon the judgment in such a case, will continue the *lien* of the first execution, if there has not been a lapse of an entire term intervening, and overreach an execution issued on a junior judgment before such *alias*, if the *alias* comes to the sheriffs hands before a sale of property under the junior execution.
4. When personal property of the defendant in execution is brought into the county after executions of different judgment creditors have come to the sheriffs hands against such defendent, the eldest judgment creditor who has preserved his *lien* will have the prior right.

Writ of Error to the Circuit Court of Sumter.

This was a proceeding by notice and motion under the statute, by the plaintiff in error against Gary, as the sheriff of Sumter, and the other defendants as his sureties. The case was commenced in the County Court, and transferred from thence to the Circuit Court, because, as it is alleged, the judge of that court was interested. The default charged, is the failure of the sheriff to pay on demand to the platintiff's attorney, the amount collected on an execution issued upon a judgment for twenty-five hundred and forty 89-100 dollars damages, and eight 06-00 dollars costs, which the plaintiff had previously recovered in the county court, against John H. Boling.

From a bill of exceptions taken at the trial, it appears that the plaintiff's judgment was rendered on the eighth day of February 1841; that the execution in question was tested of the eighth of March, thereafter, received by the sheriff on the first of April, and levied on the 22d of May, on merchandize in store and on town lots and land; and on the 25th of May, on slaves, household furniturne, cattle, &c. It is also shewn that Martha Dillard, recovered five several judgments in the Circuit Court of Sumter, at its term holden in October 1839, for a sum, amounting in the aggregate to six thousand dollars and upwards, against John H. Boling, all of which were affirmed on writ of error, against him and his sureties. Executions were issued on the affirmed judgments, and forthcoming bonds were given and forfeited. On the forfeited bonds, executions were issued against all the previous parties and the surety therein, tested of the thirteenth of October 1840, returnable on the first Monday in April thereafter, and placed in the sheriff's hands on the 20th February, 1841, which

were returned on the 25th March' 1841, indorsed by the sheriff as follows, "retured by order of plaintiff." *Alias fi. fas.* on the bonds were issued, tested the 18th of May, and placed in the sheriff's hands on the 19th of the same month, which were levied on the property on which the plaintiff's execution was levied. The merchandize was sold under all the executions for $5,993 09-100; the other property for $3,183 00-100, making $9,176 04-100, a sum more than sufficient to satisfy Miss Dilliard's executions, but not enough to satisfy both her's and the plaintiff's. It was admitted that the merchandize was not in the county of Sumter, until after the *alias* executions in favor of Miss D. were issued.

The Court decided, that the lien of the *alias* executions was prior to that of the plaintiff's execution, and that the proceeds of the sale of the merchandize was first applicable to their satisfaction. Thereupon the motion of the plaintiff was overruled and a judgment rendered against him for costs.

Murphy & Jones, for the plaintiff in error. The judgment of the Circuit Court is erroneous,

1. Because conceding that Miss Dilliard's executions are entitled to a priority of satisfaction, and still there was an excess in the sheriffs hands to which the plaintiff is entitled.

2. By directing the sheriff to return her executions without a levy, and before the return day, Miss Dillard's executions lost all lien, that may have attached in their favor. [Berry v. Smith, 3 Wash. C. C. Rep. 60; Michie v. Planters Bank, 4 How. Rep. 130; Collingsworth v. Horn, 4 S. and P. Rep. 248; Payne v. Drew, 4 East's Rep. 538; Beals v. Allen, 18 Johns. Rep. 363; Storm v. Wood, 11 ibid. 110; United States v. Conyngham, 4 Dallas Rep. 358; Davis v. Hunt, N. C. Rep. 412. See also 4 Bibb's Rep. 29; 3 J. J. Marsh. Rep. 545.

3. As to so much of the property as was not in the county of Sumter, when the originial executions in favor of Miss Dillard were in the sheriff's hands, the plaintiff's execution acquired a prior lien. [Aik. Dig. 165,] and consequently is entitled to be first satisfied.

Thornton, for the defendant admitted, that the sale under the executions, produced a sum more than sufficient to satisfy

what was due on the *fi. fas.* in favor of Miss Dillard, and the sheriff was ready and willing to pay over the excess whenever the question of priority of lien should be determined. But the sheriff could not pay it with safety to himself and sureties until that question was decided.

In respect to the second point made, the direction to the sheriff to return the executions of Miss Dilliard, did not affect the lien which they had previously acquired, as they were again issued before the property was sold, and before a vacation had intervened. The fact that a part of the property sold, was not in the county until after the *alias fi. fas.* were placed in the sheriff's hands, can have no influence in determining the priority of lien, as they relate back to original executions, so as to overreach any *fi. fa.* which may have issued subsequently.

The Judges delivered their opinions *seriatim.*

COLLIER, C. J.—1. The judgment of the Circuit Court in effect determines, that the plaintiff is not entitled to recover of the defendants any part of his execution, though there was an excess in the sheriff's hands, after satisfying the *fi. fas.* in favor of Miss Dillard, to which the record does not show that there was an adverse claimant. This is clearly erroneous, and can be accounted for, only by supposing that in litigating the question of priority between the different executions, the amount to be appropriated to their payment was entirely overlooked. Conceding that Miss Dillard was entitled to a prior lien, yet after she was paid, the residue of the money should have been adjudged to the plaintiff.—The sheriff appears to have returned the facts specially on each of the executions, and asked the direction of the Court as to the order in which they should be satisfied: this was sufficient (according to the case of Braly v. Stout, Ingoldsby & Co., at the present term,) if the return was made in good faith, and for the purpose of obtaining the instruction of the Court, to have relieved the defendants from a judgment for damages and interest.

2. The second objection made by the plaintiff's counsel, to the proceedings below, supposes, that although a *fieri facias* may be placed in the sheriff's hands, and thus become a lien upon the defendants goods and chattels, subject to be seized by it, yet it will become wholly inoperative, if the plaintiff, by any act of his, prevent it from being executed.

This question is to a great extent, *res integra* in this Court; and before we express our own opinion upon it, we will briefly notice some of the leading cases on the point.

In The United States v. Conyngham, et al., [4 Dallas' Rep. 358,] it appeared that the plaintiffs in a *fieri facias* caused the same to be levied on goods belonging to the defendants, and then assigned their judgment: their assignees permitted the goods to remain in the defendants' possession, until an execution at the suit of another plaintiff, was levied on them: *The Court* held, that the first *fi. fa.* had lost its lien, and that the latter was entitled to priority. So, where a plaintiff obtained a judgment in one Court, and on the first of January, 1811, delivered to the sheriff a *fieri facias* issued on that day, with direction *not to levy it until further instructions.* On the 3d day of the same month the sheriff was instructed, and accordingly levied the execution, but did not remove the goods from the defendant's house, but left them according to the directions of the plaintiff *till further orders.* On the 4th day of the same month, two judgments were rendered in favor of other plaintiffs, and executions issued and levied the same day on the goods left in defendants' possession. The question was, whether the execution first issued and levied, should be satisfied before those under which it was removed from the defendant's possession. The Court said, it would "make no distinction between a suspension for one day, or one or more months. The order of suspension deprives the act of the officer, in pursuance of it, of all its force and effect, until it is restored by a countermand; and if in the mean time a second execution is taken out and levied, the former must be postponed." Further: "If the execution is delivered to the officer, with orders not to levy it at all, or until further orders, the purpose of the delivery is not answered, and all the legal consequences of the measure, in respect to creditors and purchasers who would otherwise have been affected by it, are defeated. If the officer is ordered to levy on, but leave the property with the owner until he shall be otherwise directed, the party undoes by such an order, all that the officer does by the seizure—it works no change of the property—it is no levy in respect to third persons. It is not necessary that the officer should remove the property or even sell it immediately, if this be done in a reasonable time, &c." [Berry v. Smith, 3 Wash. C. C. Rep. 60.] And in Storm v. Woods, [11 Johns. Rep. 110,] it is considered a well estab-

lished principle, "that if a creditor seize the goods of his debtor on an execution, and suffer them to remain in his hands, the execution is deemed fraudulent and void as against a subsequent execution." [See also, Whipple v. Foot, 2 Johns. Rep. 422; Farrington and Smith v. Sinclair, 15 Johns. Rep. 429; Buller J. *arguendo* in Edwards v. Harben, 2 T. Rep. 596; Payne v, Drewe, 4 East's Rep. 523, and Salk. Rep. 720; 1 Ld. Raym. 251; 5 Mod. Rep. 377; 1 Wils. Rep. 44; 7 Mod. Rep. 37; 1 Esp. Rep. 205; 1 Camp. Rep. 333.]

Where the plaintiffs, having a prior judgment, issued a *fieri facias* thereon in *January*, with instructions to the sheriff "to make a levy on the property of the debtor, but to do nothing until ordered, unless crowded by younger executions, but by no means to let the execution lose its preference"—the sheriff did nothing except merely to receive an inventory of the personal property of the debtor until another execution was delivered to him in *May* following, at the suit of a junior creditor: *it was held*, that the first execution was *dormant* and *constructively* fraudulent as against that which issued subsequently. [Kellogg v. Griffin, 17 Johns. Rep. 274.] *Further*, say the Court, the evidence warrants the inference, that the plaintiffs issued their execution, not with an absolute intention of collecting their debt, but partly at least, with a view to cover the property of the debtor for his use. Having made use of their execution in a manner which the law deems fraudulent as against other creditors, it was in vain that they told the sheriff "by no means to let their execution lose its preference." The sheriff has no discretionary power in that respect. The *law* determines the preference, &c. [See also, Doty v. Turner, 8 Johns. Rep. 20.]

In Benjamin v. Smith, [4 Wend. Rep. 332,] it appears that a *fieri facias* was issued and placed in the sheriff's hands on the 27th *February*, 1827; on the 9th *March* it was levied by a deputy who took an inventory, but was directed by the plaintiff in execution not to proceed further until *July*, when defendant promised to pay it. In *August*, the deputy and the plaintiff had a conversation about the business, which was calculated to induce the former to expect further directions before he proceeded to close the execution. In *October* an execution was issued against the same defendant, and placed in the hands of another deputy, at the suit of a different plaintiff; under this execution, the pro-

perty first levied on was removed from the house of the defendant, a few days previous to the 5th *January*, 1828, and sold on both *fi. fas.* on that day; having been previously advertised under the first, in the latter part of *December—The Court held*, that the first *fi. fa.* was dormant or fraudulent as it respected the second; though *generally* speaking, the mere delay of the officer, without countenance or direction from the plaintiff, will not superinduce such a consequence, yet the countenance or approval of the plaintiff will. [See also Benjamin v. Smith, 12 Wend. R. 404; Michie v. The Planters' Bank, 4 How. Rep. 130, and the cases cited in the arguments and opinion in the latter case; Russell v. Gibbs, 5 Cow. Rep. 390.]

If these decisions ascertain the law correctly, it seems to me to be perfectly clear, that a *fieri facias*, the collection of which is delayed by the act of the plaintiff, never acquires a lien upon the goods of the debtor as against a junior execution, or if it does the lien is gone as soon as the interference of the plaintiff commences, and will only become operative from the time the sheriff is required to execute its mandate. The process is mandatory, and requires the officer to make a sum of money of the goods and chattels, &c., of the defendant, and to have the money at a term therein designated, to render to the plaintiff, together with the writ, &c.: if the course of law is arrested by the direction or approval of the plaintiff, during all that time nothing is done towards enforcing the payment of the judgment, and the effect, in point of fact, is the same as if no execution had issued. The legal presumption is, that the plaintiff intended to favor the defendant, by suing out his execution; while he would obtain a lien prior to others, he would under its protection secure to the defendant the enjoyment of his property against subsequent executions. No matter how humane and benevolent the motives which might prompt to such a course, they would not relieve the elder execution from the imputation of being fraudulent in law. [Benjamin v. Smith, 4 Wend. Rep. 336.] "If," says Mr. Justice Marcy, in the case cited, "the application of legal principles were to be influenced in any considerable degree by the indulgence of sympathetic feelings, the uncertainty of the law would soon be subjected to a much more serious reproach than the sneer of those who are ignorant of the true character of the science of jurisprudence."

The law, in this respect, is not changed by the legislation of this State. The act of 1807, "concerning executions, and for the relief of insolvent debtors," [Aik. Dig. 165,] which declares that the goods of the defendant shall be bound only from the time, the *fieri facias* or other writ of execution shall be delivered to the sheriff, &c. "to be executed;" and that the time of the delivery shall be indorsed, is substantially, if not literally, a transcript of the 29th Car. II, ch. 3, sec. 16—[See Watson's Sheriff, 175–6.]

By the act of 1828, "relative to the satisfaction of executions," it is enacted, that "The lien created by the delivery of an execution from a court of record to the sheriff, shall continue to bind the property of the defendant, as between different judgment creditors in the courts of record in this state, in the following manner, viz: if a term shall elapse after the return of the first execution, before an *alias* shall be sued out and delivered to the sheriff, the lien created by the delivery of the first writ of execution shall be cancelled and of no avail; but if a term shall not have elapsed, and the *alias* shall be delivered to the sheriff, before the sale of property, under a junior execution in favor of another creditor, the lien shall continue, notwithstanding the *alias* may not have been delivered until after such junior execution; the sheriff may return an execution any time after its receipt, and thus excuse himself for a failure to make the money; if he were to do so, he would render himself liable to the plaintiff, if by retaining it to the proper day the money could have been collected. Here, the sheriff does not return the executions, because nothing could be made by holding them up; but because the plaintiff directs him to do so, and when, from the facts stated in the record, a part of the money at least could have been made. The order of the plaintiff to return the executions before they were returnable, must be regarded as equivalent to a direction not to levy; as they would thereby lose their energy, and the sheriff be thus deprived of all power to coerce payment. When the order of the plaintiff was given to the sheriff does not appear, but there was certainly ample time to have made a levy between the days when the return was, and when it should have been made; and the consequence is, that the executions of Miss Dillard became dormant and inoperative, for all purposes against an execution issued on a junior judgment, and levied, before the *alias fi. fas.* were issued in her favor.

The practical construction of the act of 1828 has been, not to consider the mere intervention of a term between the return of an original *fi. fa.* and the suing out of an *alias*, as sufficient in itself to destroy the lien created by the delivery of the former to the officer; although such a result would follow from a literal interpretation of the statute. Whether this construction will abide the test of scrutiny, it is unnecessary to inquire, since under neither view of the act can the executions of Miss Dillard, so connect themselves with those which issued previously, as to continue the lien in her favor. If it were conceded, that the *fi. fas.* issued on the forthcoming bonds were not original executions, but were merely in continuation of those preceding them, and that the lien should date back to the time when the latter were received by the sheriff, still Miss D. would not occupy a more favorable situation. The executions on the bonds having become dormant, and in law, fraudulent, they are as if they had never issued; and consequently, there is no connecting link between those which first issued, and those which were levied on the property sold; and not only a term, but two terms, and a vacation elapsed, during which time no operative writs were in the sheriff's hands.—[*As to the continuation of a lien between execution creditors*, see 1 B. Monr. Rep. 210–11; Hood & Graham v. Winsatt, ib. 311; Million v. Commonwealth, &c.]

3. Under the act of 1807, which declares, the "execution shall bind the property of the goods against which such writ is sued forth," &c. it has been determined that in order to create a lien, the goods must be in the county to which the execution issued. The statute of 1828, is passed in reference to the act of 1807, and requires that the execution first issuing shall create a lien, as the condition on which the *alias* shall be entitled to priority of a *fi. fa.* on a different judgment, which is first delivered to the officer to execute. This is clearly shown by the first clause of the section cited. As it respects the merchandize, it is admitted that it was not in the county of Sumter until after the *alias fi. fas.* in favor of Miss Dillard were placed in the hands of the sheriff; consequently, none of the previous executions at her instance, acquired a lien on them. So that conceding Miss D's executions were entitled to all the efficacy which it is possible for such process to exert, and the *alias fi. fas.* cannot overreach and defeat the lien of the plaintiff. But in considering the second point, I

have shown that the executions on the bonds became dormant and inoperative as against the plaintiff; and consequently cannot aid the *alias fi. fas.*, so as to impart to them a lien which they did not possess themselves. The lien of an *alias* is a mere continuation of the effect of the orginal when a retro-active influence is claimed for it; and where the original is productive of no lien, of course none can be transmitted, but the *alias* must be alone looked to in a controversy between different plaintiffs in execution. Taking this to be the law, and it is clear that the lien of Miss Dillard and the plaintiff attached upon the merchandize at the same instant of time; as the executions of both of them were in the sheriff's hands when it was brought into the county. As it respects the other property sold, both real and personal, the lien of the plaintiff was paramount to that of Miss D. Even as to the land, the lien of her judgments was postponed by allowing her executions to become dormant, or by not enforcing a collection with diligence. [Mansony & Hurtell v. The U. S. Bank and its assignees, at this term.] And as it respects the personal property the judgments cannot be looked to, in determining the question of the prior lien of the executions. In every view in which the case can be considered, I am of opinion, that the judgment of the Circuit Court is erroneous; that it should be reversed, and the cause remanded.

ORMOND, J.—This is a contest between the rival executions of the plaintiff in error and Miss Dillard. The judgments of Miss Dillard were first obtained, and she has the superior *lien* on the property of the defendant in execution, unless it has been lost by her direction to the sheriff on the 25th March, 1841, to return the executions, the proper return day being the ensuing first Monday of April. This direction, it is contended, will render the execution "*dormant.*"

We understand the law on this subject to be, that if a judgment creditor place his execution in the sheriff's hands, *with instructions* not to levy, or after a levy, to hold it up and not to sell, it will be constructively fraudulent against junior judgment creditors, who will thereby obtain the superior lien. The rule is, that the plaintiff can only employ his execution to collect his judgment; he cannot use it as an instrument for sheltering or covering the property

of the defendant, against the claims of others, and any act which manifestly has this tendency is *per se* fraudulent.

This is, we think, the clear result of the adjudged cases.. In Lovrick v. Crowden, [8 B. & C. 132,] there was a seizure of goods by the sheriff, and gross delay in the sale, by the direction of the plaintiff; the Court held, that a subsequent judgment creditor might treat the first execution as fraudulent and void.

In Kempland v. Macauley, [Peake, 66,] a *fi. fa.* was delivered to the sheriff with directions not to levy until a future day, and in the meantime, another writ was delivered to him; the Court held, that the second writ must be executed as if he had not received the first.

In Kellogg v. Griffin, [17 Johns. 274,] a *fi. fa.* was delivered to the sheriff, with directions to levy, but not to sell, unless crowded by younger executions; but not to let it lose its preference. The sheriff merely took an inventory; it was held fraudulent and void against an execution issued four months afterwards on a junior judgment.

So when ponderous articles levied on, were permitted to remain with the defendant (as firewood,) which the defendant was permitted to consume; held, fraudulent as against a junior judgment creditor. [Farrington v. Sinclair, 15 Johns. 428.] So also, if by the direction of the plaintiff, goods are levied on, and suffered to remain with the defendant, for more than a year; [Dickinson v. Cook, 17 ib. 332.]

But to render an execution *dormant*, or in other woods fraudulent, there must be some act of the plaintiff inconsistent with the pursuit of the defendant by execution to obtain satisfaction of the judgment. Thus, the mere delay of the plaintiff in not compelling the sheriff to levy and sell, will not raise the presumption of fraud, as is shown in Russell v. Gibbs, [5 Cowen, 390] where the previous cases of Whipple v. Foot, [2 Johns. 416] and Storm v. Woods, [11 ib. 110,] are cited as asserting the contrary doctrine, and disapproved of. To the same effect are Kerr v. Barber, [3 Cow. 279,] and Benjamin v. Smith, [4 Wend. 332.] And see Doty v. Turner, [8 Johns. 20,] where it was held that to produce this result, there must be instructions from the plaintiff to delay the seizure, or to let the executions sleep in the sheriff's hands.

We are unable to percieve that the act of Miss Dillard, in directing the sheriff to return the executions a few days before the

proper return day, can be considered as constructively fraudulent. No consequences injurious to any other creditor could, by possibility, flow from this act; so far from covering the property of the defendant, it left it exposed to a levy from any other execution. If, however, the plaintiff should direct an execution to be returned when it might have been satisfied, to favor the defendant in execution, it would doubtless be a fraud on other creditors; but such is not the legal presumption, from the mere fact of directing the return to be made, nor indeed is it easy to conceive how any such consequence could proceed from the act, for as already stated the immediate consequence attending it, was to leave the property of the defendant exposed to a levy from any other execution.

Our statute authorising the issuance of another execution, if the first "be not returned and executed," evidently contemplates that the plaintiff may require the return to be made before the return day. This indeed might be necessary, if the plaintiff wished to send an execution to another county, without incurring the additional expense; and it cannot be supposed that the exercise of this right would involve the loss of all *liens* acquired under the execution. Our conclusion, then, on this point is, that the mere fact of directing the return to be made before the return day, is not *per se*, evidence of a fraudulent intent.

The execution of the plaintiff in error, came to the sheriff's hands, 1st April 1841, and the *alias* executions of Miss D. not until the 19th May, afterwards; but as her executions had not, in contemplation of law, as we have seen, lost their *liens* by the returns she directed to be made, and were re-issued without the lapse of a term intervening, and before the sale of the property levied on, by the express terms of the statute, [Aik. Dig. 166, § 38,] the *liens* of her executions are superior to that of the plaintiff in error, at least as to all the property of the defendant, then in Sumter county.

It further appears that some merchandize, the property of the defendant in execution, was not brought into the county of Sumter until after the *alias* executions of Miss Dillard came to the sheriff's hands.

Independent of our statute regulating the priority of *liens* between different judgment creditors, we should be inclined to think the legal rights of both creditors in such a case, precisely equal, as the *lien* of an execution, does not extend beyond the county to

which it is issued. The statute already referred to, cuts the knot and solves this, as it was no doubt intended to solve all similar difficulties between rival executions, by expressly giving the preference to the oldest execution, which had been regularly issued without the lapse of a term. Nor is the rule a mere arbitrary one, not founded in equity and justice; it is merely carrying out the idea of rewarding the most diligent. The statute in effect, connects the execution when regularly issued with the judgment, and in such case gives, as it professes to give, the preference to the *senior* judgment creditor. Without the aid of this statute, if lands had descended to a defendant against whom were several judgments, the eldest would take it. So a judgment creditor becomes entitled to all the acquisitions of personal property made by the debtor, and the statute merely declares that it shall accrue to the benefit of the *oldest* judgment creditor who has preserved his *lien*.

It appears from the record, that after satisfying the executions of Miss Dillard, there was still a surplus in the sheriff's hands: for this amount the plaintiff was entitled to a judgment, and for the error of the Court, in not rendering judgment for that sum, the judgment of the Court below must be reversed and the cause remanded.

GOLDTHWAITE, J.—I concur in the conclusions expressed by my brother ORMOND.

CRAWFORD v. THE BANK OF MOBILE.

1. A levy on goods and seizure by the sheriff, is no satisfaction of the execution, if the goods are restored to the defendant upon the execution of a delivery bond.
2. The damages of six per cent. authorised to be imposed when an injunction is obtained for delay, cannot be allowed by the chancellor, unless the facts stated in the bill are shown to be untrue, or evasive, and cannot therefore be allowed when the bill is dismissed for the want of equity.

Error to the Chancery Court at Cahawba.

The bill which was filed by the plaintiff in error, alleges that he executed a note as surety for one John Dunn, together with another as co-surety to the Bank of Mobile, upon which judgment was obtained against him and the principal, and that execution issued thereon, which was levied on the property of Dunn, to an amount sufficient to satisfy the execution. That at the time of the levy, Dunn was absent; and at the instance and persuasion of the sheriff, who informed him it was necessary one of the defendants should be a party, and that he incurred no liability thereby, he signed a forthcoming bond as surety, with two of the family of Dunn, and another person as co-surety. That the bond was forfeited, and execution has issued against him. An injunction was awarded.

The sheriff answered the bill, and denied the facts alleged in the bill against him, but the answer was afterwards withdrawn by consent of the Solicitors. The Bank failing to answer, a judgment *pro confesso* was taken against it. On motion, the Chancellor dismissed the bill for want of equity, from which this writ is prosecuted.

G. W. Gayle, for plaintiff in error.
Evans, *contra.*

ORMOND, J.—The bill appears to have been filed on the supposition that a mere levy on property, sufficient to satisfy the execution, was a satisfaction. The law is certainly otherwise. A seizure by the sheriff, on property sufficient to satisfy the debt, will be a satisfaction as it respects the defendant in execution, though the sheriff may waste the goods, and if it were conceded that the plaintiff, as surety, was entitled to avail himself of and defence which his principal could make, that is not the predicament of this case. Here the goods levied on were taken from the custody of the sheriff, by the execution of a delivery bond, any restored to the defendant in execution. It was therefore no satisfaction as it regards the defendant in execution. [See the case of Campbell v. Spence, at the present term.] As therefore, the plaintiff in error was liable on the judgment, he incurred no additional responsibility by signing the delivery bond.

It is difficult to suppose that any one is so ignorant as to believe that he incurs no responsibility by becoming a party to a delivery bond; at all events every one must be held to a knowledge of the law, and cannot plead ignorance of it.

Besides, it is not charged that the Bank was at all privy to, or consenting to the representations of the sheriff, and cannot therefore be affected by them. The bill is totally destitute of the semblance of equity, and was properly dismissed by the Chancellor, but in awarding damages against the complainant, because it appeared to him that the injunction was obtained for delay merely, the Chancellor erred.

The statute is to the following effect: "whenever an injunction shall be dissolved, damages after the rate of six per centum shall be added to the amount of the judgment; provided the court be of opinion that the injunction was obtained for delay." [Aik. Dig. 291.] It is true, that every dismissal of a bill includes a dissolution of the injunction, but we do not think it follows that because a bill has no equity, it was necessarily intended for delay. It may have been filed in good faith, under the advice of counsel, sanctioned by the opinion of the Judge granting the injunction, and in such a case, could not be said to be filed for delay. In our opinion such a conlucsion cannot be drawn, but in a case where the facts upon which the bill is filed, and the injunction obtained, are shown by the answer to be untrue or evasive.

The Chancellor divided the costs between the complainant and the sheriff. If this is an error, it is one in favor of the plaintiff in error, and cannot, therefore, be the subject of complaint by him.

The decree of the Chancellor must be so far modified as to dismiss the bill without damages. Let the costs of this court be taxed against the Bank.

LOVE & WILLIAMS v. POWELL.

1. A sheriff's deed is conclusive, and cannot be impeached on a collateral issue, except for fraud in its execution, whenever the process under which the land is sold, is supported by an existing operative and unsatisfied judgment.
2. The damages in an action of trespass to try title, cannot be lessened or mitigated by evidence that the plaintiff paid an inadequate price for the land sought to be recovered.

WRIT of Error to the Circuit Court of Lowndes county.

Action of trespass to try title. On the general issue a verdict was rendered for the plaintiff, on which he had judgment.

The defendants proved that the sheriff omitted to give notice to the defendant in execution, or to his tenant, of the levy; and also omitted to advertise the land, except on the court house door. Several parcels of land were levied on, but all were sold together, and some of the evidence tended to show that more might have been made from the sale, if the different parcels had been separately sold.

The defendants also gave evidence, tending to show that the plaintiff in execution, who became the purchaser, and is also the plaintiff in this suit, procured the sheriff to sell the lands altogether, and prevented a bystander from bidding at the sale, by inducing him to expect a part of the lands, at the price the plaintiff should bid. Evidence was also offered in mitigation of damages, and rejected, tending to show that the plaintiff had formerly sold the lands to one of the defendants for ten thousand dollars or more, and after having been paid seven thousand of the price, purchased them under the sale for three thousand dollars.

The Circuit Court left the case to the jury, upon the question whether the plaintiff had thus improperly interfered in the sale, to the defendants injury; charging, that if such was the case, it would avoid the sale. The Court refused to give several instructions, all involving the same principle, to wit: that the sheriff's deed might be collaterally impeached in this action in consequence of the plaintiff's action at the sale, or in consequence of the omission

by the sheriff to give notice of the levy as provided by the statute; and of his like omission to advertise the sale, except on the court house door.

The defendant excepted, and now opens by these assignments of error, the entire bill of exceptions.

ELMORE, for the plaintiffs in error cited, Meek's Sup. 93; Jackson v. Anderson, 4 Wend. 486; 2 Cain, 61; 1 Cowen, 623; Cock v. Sheppard, 7 Cowen, 88; 6 John. 194; 8 ib. 444; 3 Johns. Cases, 29; 1 Cowen, 611; 7 ib. 1; 16 Johns. 571; 13 ib. 97; 2 John. Cases, 438; 4 Cowen 168; 9 Porter, 679.

COOK, *contra*, relied on the cases of Mobile Cotton Press v. Moore, [9 Porter, 679;] Ware v. Bradford, [2 Ala. Rep. N. S. 676.]

GOLDTHWAITE, J.—1. All the matters contained in the bill of exceptions. present but three questions; and these are,

1st. Whether the omission by the sheriff to give the defendant in execution, the notice required by law to be given of the levy; or the like omission to advertise the lands, or to sell them in separate parcels has the effect to render the sale void.

2. Whether knowledge of these irregularities by the plaintiff in execution, connected with an attempt to deter others from bidding at the sale, will avoid the deed from the sheriff to him, as the purchaser.

3. And if not, whether the damages to be recovered by the plaintiff, ought to be mitigated or lessened, by showing that he obtained the lands at an inadequate price.

The first of these questions, in our opinion, is very fully covered by our decision in the case of Ware v. Bradford, [2 Ala. Rep. 676,] and its influence extends so far as to determine the second also. The reason that a sheriff may be made responsible in damages, if injury has resulted to the defendant in execution from any irregularity in conducting the sale, does not, it is true, apply to a case where the irregularity is caused by the plaintiff in execution; but there is one of equal, if not of greater force, that does; it is, that if the deed is pronounced void on a collateral issue, or when suit is brought for the land, the parties cannot be placed in the condition they were when the sale was made. By the sale,

the defendant in execution has paid the whole or a portion of the debt, and the plaintiff has no means to vacate the satisfaction, which must be entered on the execution after the sale has been consummated. When a convenient mode of relief is afforded by the law to one who is injured by an irregularity, whether chargeable to the sheriff or to the plaintiff, no peculiar hardship can result from it; but the evils of permitting a defendant to question the conclusiveness of a sheriff's deed, even when the plaintiff has acted oppressively or irregularly, and when he is also the purchaser, are many and great. If the deed can be thus questioned, it is difficult to say that any lapse of time, short of that by which the right of entry is barred, will close the door upon this investigation. Can it be permitted, that for twenty years, either party, as he happens to be in or out of possession, may revive this question? Or, is the deed void in the hands of the purchaser, and good to his grantee? What is the effect of acquiescence or subsequent confirmation or ratification upon the said deed? In our opinion, none of these questions can be satisfactorily answered, and we feel strengthened in the conclusion to which we came in the case of the Mobile Cotton Press v. Moore [9 Porter, 679,] that in all cases, the deed may be set aside by courts of law, in the exercise of their inherent power to prevent their process from being used for the purpose of oppression or injustice.

We are not unaware that there are many decisions in the courts of New York, which seem to sustain the position that a sheriff's deed may be impeached, when the purchaser is guilty of fraud, or is chargeable with notice of irregularity; but we cannot yield our assent to the reasons which have led these judges to such conclusions. Our conviction is, that the deed is conclusive, and cannot be impeached on a collateral issue, except for fraud in the execution of the deed, whenever the process under which the land is sold, is supported by an existing operative and unsatisfied judgment.

2. The other question relates to the supposed error of the Court, in refusing to permit the value of the land and the payments made upon its purchase, to be given in evidence in mitigation of damages. On this it is said there is a peculiar hardship in permitting a recovery in damages, when the sum paid for the land, is grossly inadequate.

It seems to us that the inadequacy of price has no connexion with the issue before the jury, in such a case as this.

The matter to be ascertained is the yearly value of the lands, and any amelioration or improvement upon them is a fair subject of set-off; but it is no answer to a claim of right that the land cost the owner little or nothing.

It will be perceived that the instructions upon which this case was submitted to the jury were much more favorable for the defendants than they should have been, under our opinion of the law governing this case; there is therefore no error, and the judgment is affirmed.

CRAWFORD v. CHANDLER, Sheriff.

1. The Court may in its discretion, permit a defendant to withdraw a plea to the merits, and demur to the declaration or other statement of the cause of action; and this, although there may have been a mis-trial, or a trial, and a new trial awarded.
2. The act of 1819, authorising a proceeding against a sheriff and his sureties, by notice and motion, for the failure to return a writ of *fieri facias;* and the notice sufficiently indicates what judgment will be moved for, when it refers to the act of 1819, as regulating the proceeding.

Writ of Error to the Circuit Court of Perry.

This was a proceeding against the defendant, as sheriff of Perry, by notice and motion, under the statute for the recovery of a judgment against him and his sureties, for failing to return a writ of *fieri facias*, issued and placed in his hands at the suit of the plaintiff, against the goods, &c. of the "Manual Labor Institute of South Alabama." The notice distinctly indicates when the motion will be made; and further states that a judgment will be sought "according to the act of Assembly of 1819, in such case made and provided." An issue was made up on the notice, and submitted to the jury, who not being able to agree, a mis-trial was had. The defendant thereupon demurred to the notice, and his

demurrer being sustained, a judgment was rendered in his favor and against the plaintiff for costs.

DAVIS, for the plaintiff in error. The defendant should not have been permitted to demur after the mis-trial, nor should the demurrer have been sustained, even if regularly interposed.

B. F. PORTER, for the defendant. There is no provision in the act of 1819, which authorises a proceeding by notice against the sheriff, for failing to return an execution. [Aik. Dig. 163–4.] The thirty-first section of the act of 1807, gives such a remedy. [Aik. Dig. 173.]

The notice does not inform the defendant for what he is called upon to answer: and as to the demurrer, it will be inferred that its regularity was not objected to.

COLLIER, C. J.—It is entirely competent for the Court to permit a party to withdraw or amend his plea at any time. And though by pleading to issue, the defendant impliedly assents that the cause of action is well stated by the plaintiff, or that he will for the present, forego any objection to its sufficiency, yet it is allowable for the defendant to withdraw a plea to the merits, with the permission of the Court, and interpose his demurrer. Whether leave will he granted thus to modify the pleadings, depends upon the discretion of the Court, but that the power does exist so long as the cause is pending, though there may have been several trials, or mis-trials, we think will not admit of controversy. And even if the Court should unwisely exercise its discretion, the party aggrieved cannot be allowed to allege it on error.

In respect to the objection, that the act of 1819 does not authorize a proceeding against a sheriff by notice, for the breach of duty alleged, it may be quite enough to say, that that question has been too often adjudged to be now considered open. [M'Whorter, et al v. Marrs, Min. Rep. 376; 1 Stew. Rep. 63; Hill v. The State Bank, 5 Porter Rep. 537; 3 Stew. Rep. 134; Godbold v. Planters' and Merchants' Bank, at last term] These cases show, not only that the sheriff is chargeable for the failure to return a *fieri facias*, but he is liable to the full amount which it required to be made.

The notice sufficiently indicates what judgment will be moved for, when it refers to the act of 1819, as regulating the proceeding.

It is not only free from objection, but seems to have been formed by a studied regard to the case of Hill v. The State Bank, [5 Por. Rep. 537.]

The judgment of the Circuit Court is reversed, and the cause remanded.

HUGHES, ET ALS. v. HALE.

1. On a motion against the sheriff for failing to return an execution of the Supreme Court, forwarded upon the certificate of the clerk of the Supreme Court, under the act of 23d December, 1840, judgment may be rendered against the sureties of the sheriff at the time of the default, although they have not been notified of the intended motion.

ERROR to the Circuit Court of Cherokee.

This was a motion against the sheriff of Cherokee county, for failing to return an execution which issued from the Supreme Court for costs. The judgment entry is as follows:

William Hale,
vs.
Moses H. Hughes, late sh'ff &
John Wilkinson,
David Love,
Zachariah Roberts, and
John Lowry.

Came the plaintiff by attorney, and the defendant Hughes, moves the Court to quash the motion, which is overruled, and the said defendant being personally present, is ruled into trial, and it appearing to the satisfaction of the Court, by the sealed certificate of the clerk of the Supreme Court of the State of Alabama, that an execution of *fieri facias* in favor of said William Hale, and against said William Lay, a copy of the same contained in the notice issued from the office of the clerk of the Supreme Court of said State, on the 15th day of July, 1841, directed to any sheriff of the State of Alabama; by which such sheriff was commanded that of the goods and chattels, lands and tenements of William Lay, he cause to be made the sum of

forty-five dollars and sixty-eight and three-fourths cents, adjudged by said Supreme Court, at the June term, 1841; said execution returnable to the January term, 1842, of said Supreme Court; and it further appearing by said certificate that on the day it issued, said execution was regularly mailed, postage paid, to the sheriff of Cherokee county, and the same has never been returned: and the said Hughes failing to make the affidavit required by law, and to adduce any proof in his defence, and it further appearing to the Court, by the production of the said sheriff's official bond, that said Hughes was sheriff, and that at the time of the default, said John Wilkinson, David Love, Zachariah Roberts, McKendree Porter and John Lowry were the securities of said Moses H. Hughes, as such sheriff. It is therefore considered by the Court that said William Hale recover of the said Hughes, and his said securities, the sum of forty-five dollars sixty-eght and three-fourths cents, the amount of said execution, and the costs of this motion.

From this judgment the defendants prosecute this writ of error. The errors assigned are,

1. The Court erred in not quashing the notice.

2. The Court erred in rendering judgment against the sureties without notice.

3. The Court erred in rendering judgment against the sheriff without proof that the execution came to his hands.

W. B. Martin, for plaintiff in error.
Stone, *contra.*

ORMOND, J.—This proceeding is instituted under an act passed 23d December, 1840, authorising the clerk of the Supreme Court, in the name of the successful party, to move against sheriffs and coroners, for failing to return executions from the Supreme Court, or for failing to make the money on any execution, &c.

The second section provides, that when the execution shall not be returned by the sheriff, the cirtificate of the clerk of the Supreme Court, under the seal of the Court, stating the contents of the execution, and that it was put in the post office, directed to the sheriff, and the postage paid, shall be evidence of the contents of the execution, and that the same came to his hands—

unless the sheriff deny on oath, that the same came to his hands, or that it was returned to the proper office by due course of mail, or that the money could not be made on the execution, as the case may be.

It is also provided, that this proceeding shall be governed by the same rules and regulations, as now govern motions against such officers and their sureties, where executions issue from the Circuit Courts.

The judgment entry in this case, is strictly conformable to the law, and shows the appearance of the sheriff, the certificate of the clerk of this court, describing the execution, which was not returned, and the refusal of the sheriff to make the affidavit which the law requires, to exculpate him from the legal inference of having failed to return the execution, and the judgmeut was, therefore, properly rendered against him.

It is however, supposed that as his sureties were not notified of the motion, that no judgment could be rendered against them. It has been too long settled to be now disturbed, that upon notice to the sheriff, a judgment may be had against the sureties to his official bond. In this case, it is shown by the judgment of the Court, that those against whom the judgment is rendered, were the sureties of the sheriff in his official bond, at the time of this default, and as this proceeding is to be governed by the same rules which obtain in motions against sheriffs, when the execution has issued from the Circuit Courts, the judgment of the court below is correct, and must be affirmed.

McCLURE, ET AL. v. COLCLOUGH, ET AL.

1. When a judgment at law is obtained against one who notwithstanding, has an equitable defence, and he sues out a writ of error to reverse the judgment at law, he is not thereby precluded, after its affirmance, from seeking relief in equity.
2. When the attorney of the plaintiff, or an agent, sufficiently authorised, induces a sheriff to omit returning an execution, three days before the proper term, by advising him that it will be sufficient if returned on the first day of the Court;

this will constitute a defence to a rule against the sheriff and his sureties for the neglect to return the execution on the first day of the court.

3. But if the sheriff omits to urge this as a defence. and judgment is rendered against him and his sureties, this is conclusive on them under the statute.
4. In summary proceedings under our statutes which authorise judgments to be rendered against sureties, without notice, when the principal is notified; the sureties are not entitled to litigate the question of liability, except in the name of the principal. The only matters which they can litigate in such cases, is the *factum* of the bond, and its legal sufficieney. The allowance of judgment against them, does not impair their rights otherwise than to cause them to proceed in another forum to ascertain if they exist.
5. When sureties in such a case seek relief in equity, the allegations of the bill must be equally distinct and positive, as are necessary to constitute a good plea of *non est factum*, at law.
6. It is no defence to a bond, that it was signed by some of the obligors "under the expectation, with the full understanding and under assurances from the public officer, authorised to take it, that another person should also execute it as a surety," when it is not shewn that this was made the condition of its delivery. If they understand the bond is to be executed by an agent, it rests with them to examine his authority; and they are not discharged if it is invalid as to other persons, from a defect in the agent's authority.
7. An averment that a sheriff's bond was never received or approved, by the officer appointed for that purpose, is a sufficient allegation to put the obligee upon proof of its acceptance; but it is not necessary that this should appear either by record or by written evidence. It is sufficient to raise a violent, if not a conclusive presumption, that the bond was received by the court, when it is found upon the files without any evidence accompanying it that it has been rejected, and the principal has executed the duties of his office.

Writ of Error to the Court of Chancery for the ninth district of the Southern Division.

The bill in this case is filed by McClure, Cooper, Brown, Dansby and Campbell, and alleges that Colclough, one of the defendants, at the fall term of the Circuit Court of Pike county, for the year 1837, recovered a judgment against McMahon & Evans, for $4089, on which $893 50-100 was paid the 28th February, 1838.

On the 6th April, of the same year, a *fi. fa.* on this judgment was issued, and placed in the hands of McRae, another defendant to the bill, as sheriff of Barbour county, to be executed. McRae could have returned the execution in sufficient time to avoid any penalty, and on the day, when he by law, ought to have returned it; but, when there was yet sufficient time to have done so, he

called upon an attorney, who, as the bill states, was the agent and attorney of Colclough, and consulted with him on the necessity of returning the execution three days before the court, to which it was returnable. This attorney assured the sheriff, that it was unnecessary, that he himself would attend Pike court, and would take the execution with him, and deliver it to the clerk, on the first day of the term. The return of no property was written on the execution by this attorney, at the request of the sheriff, and the writ was delivered by him to the clerk, on Monday, the first day of the term.

Colclough, with a full knowledge of these facts, afterwards ruled McRae, for not returning the execution three days before court, and obtained judgment against him, and the complainants McClure, Cooper and Brown, and the defendant Pugh, as his sureties. Neither of the complainants had any notice of the rule, nor did they know that judgment could be rendered against them without personal service. McRae afterwards, in the names of all the defendants to the judgment, prosecuted a writ of error to the Supreme Court, where the judgment was affirmed. After this affirmance, the complainant McClure, sued out another writ of error, under the impression that he had the right to do so, and gave bond with Dansby and Campbell, as sureties, they being wholly ignorant of the previous writ of error. The judgment was again affirmed and rendered also against the sureties. In point of fact, such of the complainants as were made liable as the sureties of McRae, were not legally bound, although McClure, Cooper and Brown, signed a paper intended to be a bond when fully executed and approved. They signed "under the expectation, with the full understanding and with assurances from the judge of the County Court, who took the bond, that the defendant Pugh, would also execute the same as surety. The judge of the County Court assured them that he was authorised to execute the bond in Pugh's name. But he was not so authorised, by which the other sureties were deceived and defrauded;" the authority given by the said Pugh was by parol for the said judge to sign his name to the bond. When the judge came to consider the approval of the bond, doubts arose in his mind as to whether Pugh was bound thereby, and so he would not and never did approve the same.

Pugh is made a defendant, because he resides out of the State,

and his assent cannot be procured to join as a complainant; McRae is made a defendant, because he refuses to join as complainant. It is also alleged that he is entirely insolvent.

Colclough and the sheriff McRae, answered the bill, but no question arising out of their answers is now before the court, as the chancellor dismissed the bill for want of equity; he considering the complainants as precluded from questioning the judgment in the Circuit Court, in consequence of their proceedings under the writ of error.

This decree is now assigned as error.

Buford, for the plaintiffs in error.
Peck, *contra.*

GOLDTHWAITE, J.—This bill sets out two grounds of supposed equity, upon which the complainants seek relief. The first is, that the neglect of the sheriff to return the execution, was induced by the agent and attorney of the plaintiff at law. The other is, that the bond, out of which the liability of the complainants is said to arise, was invalid in point of law.

1. The chancellor considered neither of these grounds, but dismissed the bill, under the impression that the complainants were precluded from coming into equity after the prosecution of the writ of error upon the judgment at law. Our opinion is, that the writ of error has no effect whatever as a bar, for it may be that it was prosecuted for errors which have no connexion with the present aspect of the case, and it would be exceedingly onerous to hold a party concluded from the pursuit of one remedy by seeking another for a matter entirely distinct. The statute doubtless places the matter on its true foundation, when it requires a release of errors to be filed before an injunction shall be awarded; but there is nothing to prevent a party from testing any supposed error by taking his suit to an appellate court, and afterwards, if the case warrants it, from seeking relief in equity. The reason assigned for the decree not being sufficient to sustain it, we are called on to examine the case itself as made by the bill.

2. As to the first point, we are clear, that if the attorney of the plaintiff at law, or an agent properly authorised, had induced the sheriff, by any advice, or direction, to delay the return of the execution in the manner stated by the bill, this would constitute a

sufficient defence to the rule, and neither the sheriff nor his sureties would in such a case, be responsible, because the plaintiff has the undoubted right to control his own process and relieve the sheriff from the necessity for returning it when not executed.

3. But the question here is a different one, and is, whether the sureties of the sheriff can avail themselves of this defence, after the plaintiff at law has succeeded in fixing the liability of the sheriff, and after the statutory judgment has been rendered against them.

The common law rule, that a judgment is not evidence against a stranger to it, is familiar to all, and the mere fact that several persons are jointly, or jointly and severally bound by the same instrument, does not create an exception. Thus it has been held that if A and B, be jointly bound in a recognizance, that A shall keep the peace, and a judgment is afterwards given against him for a breach of it, this judgment is not an estoppel to B, when he is sued on the recognizance; [10 Viner's Ab. 464.] There is some contrariety of decision on this subject in the American Courts, as in some of the States, a judgment against the principal in an official bond, is held to be no evidence against his sureties, whilst in others it is said to be *prime facie* evidence of all the matters ascertained by it, and even conclusive when the principal is by law required to do some particular act. [See the cases collected in Cowen & Hill's Notes 816, 984, 669.]

We do not see clearly, how there can well be any middle ground between rejecting such evidence altogether, or giving it a conclusive effect. If it is said to be *prima facie* evidence against a surety, it may be asked, but cannot well be answered, what means has he to disprove it, or how is he to establish a negative? Again, the judgment against the principal may be induced by his declarations when these would not be evidence against the surety. And do they become so when endorsed by the verdict of a jury? Without undertaking now to determine what is the effect in general, of such judgments, as evidence against the sureties, we prefer to rest this decision upon our own statutes, as was done in the case of Williamson v. Howell, [4 Ala. Rep. N. S. 693.]

4. We think then that our several statutes where they authorise summary judgments to be rendered against sureties, without notice to them, or by giving notice to the principal, were intend-

ed, and have the effect to make the judgment against the principal conclusive of every matter found by it, and that so long as the principal is alive and is made a party, the sureties, as such, are not entitled to litigate the question of liability, except in the name of the principal. We think the intention never could have been to permit a judgment to be rendered which would be conclusive of nothing whatever against the surety, which would be the case, if he is allowed to question the liability of his principal, when that has been judicially ascertained.

The only matters which the surety can litigate in these cases, is the *factum* of the bond, and its legal sufficiency; and the allowance of judgment and execution on it cannot have the effect in any manner to impair their rights, otherwise than to cause the parties to proceed in another forum to ascertain that they exist.

There is no other view in which the constitutionality of these and similar statutes can be sustained, for it cannot be questioned under our constitution and laws, that every person is entitled to have his defences heard, and his suits judicially determined.—The legislature is authorised clearly, by law, to provide that certain consequences shall flow from certain acts; or, as in this case, that the ascertainment of the liability of the principal shall fix the liability of the sureties; but the facts and circumstances out of which this relation arises, is and must always be, a matter for judicial determination. This consideration, as it shows the surety is concluded by the judgment against his principal, is conclusive against the first ground of equity assumed by the bill.

5. In the examination of the other ground of equity asserted by this bill, our consideration will be first given to the matters which are essential to be set out when a bill is properly filed on such a ground as this. It is sufficiently evident, without any illustration, that in a suit at law upon this bond, the obligors could only dispute their liability, either upon demurrer or by a plea of *non est factum.* As the plaintiff at law already has a judgment, the sufficiency of the pleadings cannot be enquired into here; and in order to avoid the effect of that judgment, and put the plaintiff upon proof of the *factum* of the bond, the allegations of the bill must be equally positive and distinct, as would be necessary to sustain a plea of *non est factum.*

6. The bill asserts that this bond is invalid, for two reasons: 1st. That all the sureties "did sign a paper purporting and in-

tended to be such bond, when fully executed and approved, yet they signed the same under the expectation, with the full understanding, and with assurances from the county judge, who took the same, that Pugh, one of the defendants, would also execute the same as surety; and that the county judge assured the complainants that he was authorized to execute such bond in Pugh's name. That he was not so authorized, and in this case the complainants were deceived and defrauded by the county judge."

2d. "That though said bond, under parol authority from said Pugh, was by the said judge to be signed with the name of said Pugh, yet that the said Pugh never executed said bond, either in person or by lawful authority, nor ever became a party thereto or bound thereby; and when the said county judge came to consider of the approval of said bond, doubts arose in his mind as to whether said Pugh was bound thereby, and so he would not, and did never approve the same;" and the complainants then aver, that the said bond never was received or approved by the county judge of said county of Barbour, or any other proper officer.

The first set of facts, from which the invalidity of this bond is assumed, as we consider them, do not present any defence whatever, nor would they, if pleaded to an action at law, constitute a good plea. It is admitted that the bond was sealed and delivered, by those of the complainants who signed it, under the expectation and assurance that it would also be obligatory on Pugh; but this was not made a condition of the delivery. If, as they assert, the bond was to be signed by an agent, it was clearly their business to ascertain the nature and extent of his authority, if that was considered material by them, but there is no reason why a failure by Pugh to become bound, shall discharge them.

7. The second fact is a more important one, if sufficiently alleged. If the allegation of the bill in this relation, stood alone and unconnected with the positive averment that the bond never was approved by the Judge of the county court of Barbour county, or by any other proper officer, we should consider it argumentative and evasive; but all that may be stricken out, and then the positive and direct averment will remain, that it never was received or approved, as the law directs. This, in our opinion, is equivalent to a denial of the validity of the bond, for the reason that it never was accepted by the person who is constituted the agent of the State to receive it. The proof of this averment is

much more difficult than its assertion; or rather the facts out of which an acceptance will be inferred, are of easy proof, if they exist. This question was fully considered in the Bank of the United States v. Dandridge, [12 Wheat. 64,] and also in Althorp v. North, [14 Mass. 167.] We can add nothing to what is there said. The statute which requires a sheriff, before entering upon the duties of his office, to give bond with such number of good and sufficient securities as may be approved by the county court, [Digest, 388, § 4,] does not require the approval to be manifested by any matter of record, or by writing. It is sufficient, (to use the words of the Court in one of the cases just cited,) to raise a violent, if not a conclusive presumption that the bond was received by the Court, as the security required by the statute, when it is found upon the files, without any evidence accompanying it that it has been rejected, and the principal has proceeded to execute the duties of his office.

As this averment is sufficient to put the fact of the acceptance of the bond in issue, the bill upon its face contains a substantial matter of equity, and therefore ought not to have been dismissed, unless at the hearing, the fact alleged was shown to be untrue.

The decree, for this error, is reversed, and the cause remanded.

THE STATE v. PILE AND PILE.

1. It is not a sufficient ground for arresting the judgment in a criminal case, that the record does not show that the grand jury were drawn according to law, or the *venire* executed.
2. An indictment against two, which charges one with an assault, with the intent maliciously and feloniously to kill and murder, and the other with maliciously and feloniously, inciting his co-defendant to make an assault with that intent, is good at common law.

3. The judgment in a criminal case will not be arrested, because the record shows that the jury were sworn well and truly to try the issue, &c.; the case could not be thus tried, without having a proper regard to the *law and evidence.*

The defendants were indicted in the Circuit Court of Covington, for an assault with the intent to kill and murder William Holland. Greenberry Pile is charged with having made the assault, feloniously and unlawfully, by discharging a rifle gun.—Caleb Pile is charged with having feloniously and maliciously incited his co-defendant to make the assault with intent aforesaid. The defendants were tried on the plea of "not guilty," and being convicted by the verdict of the jury, it was adjudged by the Court that Greenberry Pile be committed to the penitentiary for five years, and Caleb Pile for the space of seven years. Thereupon, the defendants moved in arrest of judgment for the following reasons:

1. There were only fifteen names on the *venire facias* from whom the grand jury were selected.

2. The indictment does not pursue the statute.

3. Caleb Pile is indicted as accessory to the assault.

4. The jurors who tried the cause, were sworn to decide it according to the evidence, when they should have been required to try it according to law and evidence.

5. It does not appear that the grand jury were drawn thirty days before the sitting of the Circuit Court; nor does it appear that the *venire* was executed.

6. It does not appear that the proper officers were present at the drawing of the grand jury.

This motion was overruled, and the questions of law thereupon arising, were referred to this Court as novel and difficult.

Attorney General for the State.

No counsel appeared for the defendants.

COLLIER, C. J.—In respect to the objection, that it appears from the recital in the record, that the *venire* required but fifteen persons to be summoned for the grand jury, it may be quite enough to say, that the jury law was modified by the act of December, 1841, so as to require but fifteen to be drawn and summoned for that purpose in the county of Covington, and many others. The other objections to the grand jury, constitute no

reason for arresting the judgment; if they could have availed the defendants, they should have been brought to the view of the Circuit Court by plea in abatement. Such has been the repeated decisions of this Court. [Collier v. The State, 2 Stewt. Rep. 388, and subsequent decisions.]

By the 26th section of the 8th chapter of the act "Regulating punishments under the Penitentiary system," it is enacted that "all indictments for offences inhibited in this code, which are offences at common law, shall be good, if the offence be charged or described according to the common law; and the party charged, on conviction, shall receive the punishment prescribed by this act."

The indictment, we think, is good, without the aid of this provision; true, it contains some expletives, which however, are matters of aggravation, and do not vitiate it. [The State v. Stedman, 7 Porter's Rep. 495.] But it is certainly cured of every defect by the statute; for it is a good indictment at common law as to both the defendants. It is a mistake to suppose that Caleb Pile was indicted as an accessory, technically so called. He is merely charged with *inciting, moving and procuring* his co-defendant to commit the offence, and if the allegation be true, in legal contemplation, he is quite as guilty as him who was prompted to act, and may be punished as a principal with him. Where indictments are preferred against two or more, they are frequently drawn in this form, as is abundantly shown by the books of criminal pleading: and this mode of stating the participation of the respective defendants, is consistent with reason, and has been too long practised to be now adjudged irregular.

The recital in the judgment entry is, that the jury were sworn, well and truly to try the issue joined. This it is believed is a substantial compliance with the forty-sixth section of the tenth chapter of the act "Regulating punishments under the Penitentiary system." To try the issue "well and truly," they must have a due regard to the evidence, and the law applicable to it; and to show, that they have thus tried it, they must express their conclusion by a verdict in proper form. On this point, if necessary, the judgment might be sustained by other reasoning quite as cogent, but we deem it unnecessary to enlarge.

For neither of the reasons stated in the record, should the judgment have been arrested; and so far as its legal sufficiency has been referred to this Court, it is consequently affirmed.

OLIVER v. OLIVER.

1. Upon a bill filed for a divorce by the wife, in which she does not claim alimony, no decree can be made in favor of the husband, on his answer for money paid by him for the debts of the wife, contracted before marriage. If such a decree can be made in any case it must be on a cross bill filed by the husband.
2. When it appeared that the husband had made a settlement for the separate use of the wife and her children, by a former marriage, it might be proper for the chancellor to refuse relief to the wife applying for a divorce, (although he could not decree in favor of the husband) until she made a re-conveyance of such separate estate.

ERROR to the Chancery Court at Lowndes.

G. W. GAYLE, for plaintiff in error.
WILLIAMS, *contra.*

ORMOND, J.—This was a bill filed by the defendant in error by her next friend, against Creed T. Oliver, her husband, for a divorce *a vinculo matrimonii*, and settlement of her dower interest in her former husband's estate.

The answer denies the acts of cruelty charged in the bill, but it is fully sustained by the proof, and we are of opinion that such a case is made out, as justified the chancellor in dissolving the bonds of matrimony existing between the parties.

It is however insisted, that as it appeared that the husband had discharged debts to a considerable amount, which existed against the wife previous to the marriage, that an account should be taken between the parties, and an allowance made to the husband, out of the estate of the wife.

Whether it might not have been proper to consider this fact on an application for alimony, it is not necessary to consider, as no such application was made, or allowance granted. Waiving therefore, the consideration of the question, whether the husband could, in any case, upon a divorce, claim to be reimbursed for debts paid for his wife, contracted by her, previous to the marriage, it is very clear no such decree could be made upon the pleadings in this case. A defendant in chancery, can only pray to

be dismissed the court. If he has any relief to pray against the complainant, or discovery to seek, he must do so by a cross bill. [Lube's Eq. Pleading, 39.] The same principle was affirmed by this Court, in the case of Cullum v. Harding, at the last term.

It might, nevertheless, be proper, that a court of chancery should refuse relief, even upon an application for a divorce, unless the party seeking its aid, should, as a condition precedent, do what justice demanded. In this case, it appeared from the answer and the proof, that the husband had made a settlement of certain securities for the separate use of his wife and her children. Under the circumstances of this case, it was not equitable that she should have retained this after being divorced from her husband, and we are informed by the chancellor, that she has relinquished all her interest in that fund.

There being no error in the decree of the chancellor, it is affirmed.

QUIGLEY v. CAMPBELL & CLEVELAND.

1. Where a judgment is obtained against an administratrix in a suit where she is the plaintiff, (under our statute of set off; Aik. Dig. 181, § 174,) upon the certificate of the jury, that the plaintiff is indebted to the defendant, and she is afterwards sued on a *devastavit*, such judgment raises no presumption of assets in her hands.

Writ of Error to the Circuit Court of Mobile county.

This is an action of debt by Campbell & Cleveland, against Mrs. Quigley, to charge her personally for the amount of a judgment, recovered against her, as the administratrix of William Quigley, deceased. The declaration is in the usual form, alleging that assets came to her hands and had been wasted and converted to her own use.

The only question argued, arose upon a demurrer to evidence,

on which the Circuit Court gave judgment for the plaintiffs, and which the defendant now seeks to reverse.

The record given in evidence, discloses that Mrs. Quigley, as the administratrix of William Quigley, deceased, brought an action of *assumpsit* against Campbell & Cleveland, to which they pleaded the general issue, with notice of set off. That cause was tried at the fall term, 1838, of the Circuit Court of Mobile county, when the jury found a verdict for the defendants, and also certified a balance to be due from the plaintiff to the defendants of $1223. On this verdict a judgment was rendered, that the plaintiff should take nothing by her writ, but that the defendants should recover of her the sum so certified to be due them, as well as the costs of suit. The plaintiff shewed nothing in evidence, but this record and the execution issued on it, which was introduced for no other purpose than to show the amount of the costs.

The defendant introduced no evidence whatever.

STEWART, for plaintiff in error, insisted there was no sufficient proof of assets, or of a *devastavit.*

DUNN, *contra*—cited, and relied on the case of Burke v. Adkins, [2 Porter's Rep. 236.]

GOLDTHWAITE, J.—An administrator becomes personally liable for the debt of his testator whenever assets in sufficient quantity to answer the debt have come to his hands, and have been wasted or misapplied by him. Wheatly v. Lane, [1 Saund. 216.] The presumption, or rather the proof of assets, is usually deduced from the omission by the administrator to plead *plene administravit,* but we take it for granted that neither presumption or proof can arise from a judgment *quando acciderunt,* and it seems that the judgment given in evidence is entitled to no greater consideration.

It will readily be perceived that it is one of unusual character; it is given, if at all, by the statute of set off. [Digest, 281 § 126;] but conceding it to be regular, it cannot be construed as an admission of assets, for the reason that the administratrix has had no opportunity to shew the condition of her administration.

We are satisfied that no recovery can be had in this case, without showing assets unadministered at the time of the judgment, or

that sufficient have since come to her hands, and have been wasted by her, or misapplied.

The judgment is reversed and cause remanded.

SALLY, use, &c. v. GOODEN.

1. The act of 1839 "To abolish attorneys fees in certain cases," in requiring that the defendant shall plead to the merits within the first week of the appearance term, or forfeit his right to make any defence thereafter, though imperative in its terms, must be so construed as to authorise the court in which the suit is pending, in its discretion, to permit the defendant to plead at a subsequent term.
2. The declarations of a nominal plaintiff made before he had parted with his interest in the note, the foundation of the action, are admissible evidence; and where there is no proof of the time when another person became the beneficial proprietor of the note, declarations made at any time before suit brought will be received.

Writ of Error to the Circuit Court of Randolph.

At a term of the Circuit Court, holden in April 1841, the plaintiff in error, declared against the defendant in debt, on a bill single. In the vacation thereafter, the plaintiff's attornies noted on the docket, the failure to file a plea, and that a judgment by default was claimed. At the spring term of 1842, this judgment was confirmed and entered in due form, though the defendant objected, and moved to set it aside on affidavit of merits, as well as an excuse for not pleading.

At the fall term of 1842, the cause was tried and a verdict found for the defendant, on which a judgment was rendered. On the trial the plaintiff excepted to the ruling of the presiding judge, and has caused to be certified to this court, certain points then, and previously reserved. It appears, that after the judgment had been entered at the spring term of 1842, the plaintiff moved the court to set it aside, which motion was granted, on the payment of all previous costs, for which judgment was entered. The plain-

ts moved the court to strike the cause from execution to issue upon the judgment of the which motion was overruled, and the parties heir case to the jury for trial. The plain- idence, the defendent introduced a witness, by him certain declarations made by Sally, ngle, who was an Indian. These declara- : in 1834, shortly after the paper was ess if it was a good note, to which he an- —a short time after she told witness that er the note, and showed him some silver ed from him. This evidence was objected e court to go to the jury.

ff, insisted, that the failure to plead to the term, entitled the plaintiff to a judgment by of 1837, "to regulate certain judicial pro- "to abolish attorneys fees in certain cases" e right to set aside that judgment, and let e was no error in this, the declarations of e.

or the defendant.

-The act of 1837, "to regulate certain ju- acts that the plaintiff shall file a declaration rs of the term, where the court, is by law, nly; that the defendant shall plead or de- after; and if any other pleadings shall be hall be severally and successively filed until an issue of fact, or law be made up. ner, that the pleadings shall be made up further time be given by the court; that if the pleadings on his part, the suit shall be *oss.* entered on motion of the defendant— part of the defendant, the plaintiff shall be by default.

ish attorneys fees in certain cases" passed in all suits instituted for the purpose of col ment shall be entered at the appearance

term for the failure of the defendant to appear and plead; that the defendant shall be compelled to plead to the merits within the first week of the appearance term, and upon failure thereof "forfeit his, her, or their right to make any defence thereafter."

It is not pretended that the first act interferes with, or abridges the discretionary power of the primary court to permit the parties to plead at any time, or even to set aside a judgment or grant a new trial with a view to amend the pleadings. But it is insisted, that the act of 1839 is imperative in its terms, and must be enforced, although in some cases it may operate great injustice. The great object of that statute as indicated by the third section, which absolves the defendant from the payment of a tax fee, where no defence is made, is to cheapen the administration of justice, by dispensing with the services of an attorney in such cases. Its provisions seem to be framed with a view to that end. The language of the second section, which declares the defendant's right to make defence, forfeited, where he has omitted to plead to the merits within the first week of the appearance term, is express, and if literally interpreted, is decisive of the case at bar. But the subject matter of the statute, the pre-existing laws and rules of Court regulating the practice in this respect, all seem to us to require such a construction to be given to the act, as will not divest the Court of all discretion as to the time of pleading. Suppose it should so happen that it was utterly impracticable from sickness of the defendant or his attorney, or from other causes alike uncontrollable, to plead within the time prescribed, if the Court in which the suit was pending could not interfere, chancery, if the defence was meritorious, would afford redress, as the act does not restrain that tribunal. To prevent litigation, so protracted and expensive, we think the spirit of the statute would be promoted, by the court of law doing directly, that which could be thus circuitously effected. If a judgment may be set aside in any case, so as to let in a plea by the defendant, a revising court can fix no limitation to the cases in which the same thing may be done; but the primary court must exercise a general discretion over the subject, in advancement of the end of justice.

A permission to plead should not be given where the defendant has forfeited the right, unless he shows *prima facie* a meritorious defence, and a sufficient excuse for his neglect; but of this, the

Court in which the suit is brought, must be the final judge. [See Smith v. Saxton, 6 Pick. Rep. 483; Lessee of Burgett v. Burgett, 1 Ohio Rep. 469.]

In respect to the declarations of the nominal plaintiff, if they had been made after she parted with her interest in the specialty sued on, they should have been rejected as incompetent evidence. But for any thing appearing to the contrary, the conversations between herself and the witness, adduced by the defendant, were most probably made while she was the proprietor of the paper. In the absence of all proof to this point, the evidence was such as the jury should have been allowed to consider, under the instructions of the Court.

In Brown, use, &c. v. Foster, (at the last term,) it was held, that as it did not appear when the nominal plaintiff transferred his interest, his declarations, made before suit brought, were admissible. [See also, Chisholm, use, v. Newton & Wiley, 1 Ala. Rep. N. S. 371; Copeland & Lane, use, &c. v. Clark, 2 Ala. Rep. 388.]

The argument of the plaintiff's counsel, that in the absence of proof, it must be intended that the beneficial plaintiff became entitled to the paper before its maturity, is not well founded where a transfer of title is not passed in the ordinary course of business; however the law may be in case of an indorsement. [See Marston v. Forwood, at this term.]

This view is decisive to show, that the case is free from error; and it is consequently affirmed.

McELROY v. McELROY.

1. When the county judge impannels a jury to try the question of sanity, where a will is offered for probate, he has the power to set aside the verdict and to grant a new trial, if, in his opinion, the verdict ought not to be permitted to stand.
2. There is no middle ground between capacity and incapacity, to make either a contract or a will, and both, when assailed on the ground of insanity, stand on the same footing.

ERROR to the Orphans' Court of Dallas.

This was a proceeding in the Orphans' Court of Dallas county, upon the last will and testament of James McElroy, the probate of which was contested, on the ground, that the deceased was not of sound mind and disposing memory; and that the will was obtained by undue influence; and a jury being impannelled to try the issues joined between the parties, found in favor of the contestants, and thereupon the court decreed that probate of the will be refused, and that the paper propounded as a will, be set aside, and held for nought.

This decree and verdict, the court, on motion, afterwards set aside and granted a new trial.

The cause coming on to be heard at a subsequent term, the jury found the issues in favor of the plaintiffs, and that the paper propounded by them, was the last will and testament of James McElroy, deceased; whereupon, the same was admitted to probate.

From a bill of exceptions taken during the trial, it appears that the question of sanity being at issue, the contestants introduced testimony tending to show, that at the time of making the will, the testator had not sufficient mind to make a valid will, and on the evidence as to sanity, moved the court to charge the jury that more mind was necessary to make a will, than to make a simple contract; which charge, the court refused, and the contestants, by their counsel, excepted.

The assignments of error are,

1. The granting a new trial.
2. The matter set forth in the bill of exceptions.

G. W. GAYLE, for plaintiffs—cited, [2 Salkeld, 650; Viner's Ab. Trial, 658; 1 Burr, 568; 1 Strange, 113, 394, 499; 1 Johns. Cases, 179, 181, 241; 2 Johns. Rep. 371; 2 Porter, 342.]

EVANS, *contra*—[4 Chitty's General Practice, 30, 87; 3 Black. Com. 387, 394; Tidd's Prac. 814.]

ORMOND, J.—In England, and in some of the States of the Union, it appears that the power of granting a new trial, after a trial upon the merits of the case, is denied to the inferior courts.

The reason of this, appears to be, that these courts are under the supervision and control of the superior courts, and that when the cause is removed to the higher tribunal, it is *tried de novo*. [Barr v. White, 2 Porter, 342;] The People v. The Justices of the Del. Com. Pleas, 1 Johns. Cases, 181; Tidd Pr. 816; 1 Burr. 568.]

That branch of the jurisdiction of the county court which is popularly called the Orphans' court, is not an inferior court in this sense of the term; although of limited jurisdiction, its power over the subjects confided to it, is plenary, and in most cases, exclusive, subject to an appeal, or writ of error to the Circuit or Supreme Courts. It has the exclusive power of determining the validity of wills and testaments, and admitting them to probate, and may impannel a jury to assist in ascertaining whether a testator was of disposing mind and memory. Having the right to impannel a jury to ascertain this fact, it would seem necessarily to follow, that it had all the rights incident thereto, among which, must be the power of granting a new trial, if the verdict ought not to stand, either from the admission of improper testimony, a wrong exposition of the law, misbehaviour of the jury, a finding against the evidence, or for any of the various causes which would render it proper to grant a new trial. It is true that in some of the instances here given, the points might be reserved on the record for the revision of an appellate tribunal, but in the great majority of cases, where a new trial ought to be granted that would be impossible, and if practicable, could not be reviewed on error, according to our practice, in an appellate court.

The consequence would be, that great injustice would be done frequently, or a court of chancery would be compelled to interpose, and grant a new trial. We are therefore entirely satisfied that the county judge may, in such a case, as the present, grant a new trial, whenever, in his opinion, the verdict of the jury ought not to be permitted to stand.

The question presented on the bill of exceptions is, whether the establishment of a will does not require more certain proof of the possession of a sound mind, by the testator, than would be required to fix the liability of the same person to a contract. We do not think the court erred in answering this proposition in the negative. In either case, the act would be void, if the actor was not of sound mind, but we know of no rule by which the legal capacity is graduated by the act.

There can be no middle ground between legal capacity and incapacity, to make either a contract, or a will, and both must stand in regard to this question, precisely on the same footing.

Let the judgment be affirmed.

KIDD v. KING.

1. The circumstance that an agent, acting in the business of his principal, takes notes payable to himself, in discharge of the sum due to his principal, is not, by itself, such evidence of a conversion as will dispense with proof of a demand of the money collected on the note before suit brought.

Writ of Error to the Circuit Court of Marengo county.

King, as the administrator of one Cabbaness, brought his action for money had and received, against Kidd. On the trial, it appeared that one Edmunds had leased to Kidd certain lands and slaves, at a yearly rent, to be paid in cotton. This lease was afterwards transferred to the plaintiff's intestate, Cabbaness, at an advance of one thousand dollars. Cabbaness sold the lease to one Brame, for an advance of one thousand dollars on what he gave. After the latter had been in possession for some short time, an agreement was made between one Robinson, as the trustee of Edmunds, and the defendant, by which the contract for the lease was rescinded, and the property afterwards was delivered over to Robinson, who agreed to pay two thousand dollars as a consideration for the rescision. As the consideration for this agreement, he gave to the defendant, Kidd, two promissory notes, payable to him. Both these notes were paid to Kidd before the institution of the suit. There was also evidence tending to show that in this contract for the recision of the lease, Kidd acted partly on his own account, and partly on account of Cabbaness, and as his agent; that their interest in the notes taken from Robinson, was equal. There was no evidence of any demand of the money before the suit.

On this evidence the Court was requested by the defendant to instruct the jury, that if he received the money as the agent of Cabbaness, the plaintiff could not recover, without showing a demand before suit. This was refused; and the jury was instructed, that the evidence did not disclose such a case of agency as to make a demand of the money before suit, essential to a recovery.

The defendant excepted to the refusal to give the charge asked for, as well as to that given, and now seeks to reverse the judgment given against him, on the ground that the Court erred.

MURPHY & JONES, for the plaintiff in error.
MANNING, *contra.*

GOLDTHWAITE, J.—The facts of this case seem to bring it very fully within the influence of the decision made in that of Sally v. Capps, [1 Ala. Rep. N. S., 101,] unless a distinction can be drawn from the circumstance, that here, the agent took notes in his own name for the sum of money coming to his principal. We believe it has uniformly been held, in this Court and elsewhere, that an agent or factor may take notes payable to himself, on account of property sold for his principal, without being thereby made liable, as in case of a conversion.

This principle was so ruled in the case of Goldthwaite v McWhorter, [5 S. & P. 284,] and it seems to be applicable to the state of evidence before the jury. The mere circumstance that an agent takes a note in his own name, for a sum of money coming to his principal, is not, by itself, evidence of a conversion. In such a case, we apprehend, the principal could at any time claim to have the note transferred to him, and if refused, the agent at once would become liable as for a conversion; but if he acquiesces and permits the agent to receive the money, he is not entitled to his action, without a demand or something equivalent to it, showing the agent wrongfully withholds the money. [See Stewart, et als. v. Frazer, decided at this term.]

Let the judgment be reversed, and the cause remanded.

HADEN, ET AL. v. WALKER.

1. Where the defendant in execution, after the same has been levied on personal property of sufficient value to satisfy it, assents to the assignment of the judgment to a third person, it may be inferred that all further proceedings under the levy were suspended, and that the property was returned to the defendants possession, if it had been removed; in fact it may be questioned whether the defendants assent would not estop him from insisting upon the discharge of the judgment by any thing done by the sheriff previous to its assignment, and impose on him the necessity of re-possessing himself of the property levied on.
2. When a judgment has been assigned, the assignee may sue an execution thereon in the name of the plaintiff, and independently of his control.
3. Where the sheriff returns an execution thus, "the defendants in this case have settled with plaintiff's attorney, as per order of same—costs and commissions paid to sheriff," a subsequent execution cannot issue without the authority of the court.
4. *Quere:*—Is it competent for the sheriff to indorse a return upon an execution in any other form than the statute prescribes?

WRIT of Error to the Circuit Court of Macon.

From the record in this cause it appears that the defendant in error, was plaintiff in a judgment recovered in the Circuit Court against the plaintiffs in error, and that the former moved that court, to allow the sheriff to amend a return made on a *fieri facias*, issued thereupon the 24th of February, 1841. The amendment proposed, was to strike out a return in these words, viz: "The defendants in this case have settled with plaintiff's attorney, as per order of same—costs and commissions paid to sheriff—W. Fitzpatrick, sheriff;" and substitute the following: "Indulged by John H. Joice, who represents himself to be assignee of plaintiff." Which motion was granted, and the return thus modified.

The defendant also moved to quash all writs of *fi. fa.* and *venditioni exponas* issued in this case, since the spring term of the court holden in 1841, which motion was overruled.

The execution which issued returnable to the spring term of 1841, was levied on ten or twelve slaves, and without selling them, it was returned as above stated. It further appears that the plaintiff in the judgment assigned the same in writing to John H.

Joice, on the 26th of April, 1841, and the defendants assented in writing to the assignment, agreeing that all the rights and remedies of the plaintiff in respect thereto, should vest in the assignee.

Other facts are set out in the transcript, but those stated are quite sufficient to the understanding of the case.

MAYS, for the plaintiff in error, made the following points.

1. The levy of the execution on slaves, of value sufficient to pay it, is in law a satisfaction; unless it appeared that they were returned to defendant's possession. It must be intended that the sheriff wrested them from the defendant, and it cannot be presumed that they were re-delivered in the absence of a delivery bond. [4 Mass. Rep. 402; 3 Yerg. Rep. 297; 12 S. & Rawle's Rep. 41; 4 Cow. Rep. 417; 12 Johns. Rep. 207; 7 Id. 428; 2 Bailey's Rep. 102; 1 Salk. Rep. 323; 6 Wend. Rep. 562; 2 Bacon's Ab. 719; Watson's Sheriff, 138, 192; 9 Porter's Rep. 201; 1 Ala. Rep. 359.] And even if they were returned to the defendant by plaintiffs orders, still the execution is satisfied. [12 S. & Rawle's Rep. 41. See also Bingham on Executions, 269.]

2. The assignment of the judgment to Joice was made by the plaintiff's attorney in his absence, but at a time when the defendant was present; and the money avanced by the former must be regarded as a loan to the latter, so as to make the entire transaction operate a satisfaction of the execution. [See 6 Porter's Rep. 432; 3 Ala. Rep. N. S. 132.]

3. The sheriff's return, until amended by leave of the court, was operative, and the clerk in the *interim*, had no right to issue another execution. [Tidd's Prac. 934; 1 Porter's Rep. 30; 1 Ohio Rep. 214; 1 Root's Rep. 453; 4 Day's Rep. 222; Hardin's Rep. 122; 1 Johns. Rep. 529; 8 Id. 260; 1 Starkie's Rep. 318; 10 Pick. Rep. 47, 169; 6 Cow. Rep. 465; 1 Bibb Rep. 608; 3 Id. 343.]

4. The return of the sheriff, though it does not strictly conform to law, is nevertheless good under our practice; and is equivalent to a return of satisfied, by payment of the money. [See Bingham's Ex'ns, 269.] The motions were simultaneously determined, and the question is, did the court err in its decision?

DARGAN, for defendant.

COLLIER, C. J.—1. It has been so often adjudged, as to have

become a settled principle, if the sheriff take goods in execution under a *fieri facias*, of sufficient value to satisfy the same, the debtor is discharged from all liability to satisfy the judgment; and this whether the goods be sold or not; but the sheriff becomes responsible to the creditor in virtue of the seizure. The reason, so far as the debtor is concerned, is, that he has been deprived of his property. Webb v. Bumpass, [9 Porter's Rep. 201,] declares this to be the law, and states further, where the goods levied on, are removed by the defendant, or by his permission or connivance, so that they cannot be sold under the execution, or under a *venditioni exponas*, such a result will not follow.

In the case before us, the inference, in the absence of any direct evidence to the point, would be, that the slaves levied on, if removed from the possession of the defendant in execution, were returned to him. This seems to us to be but a reasonable conclusion from the proof, that the judgment was assigned to Joice, with the defendant's assent, and that no further proceedings were had on the execution. If a sale was coerced, or the slaves retained, he of course would not have consented to the assignment; in fact, the retention by the sheriff, would have amounted to a satisfaction of the judgment, and there would have been nothing to assign. Besides; it may well be questioned, whether the assent of the defendants to the purchase of the judgment by Joice does not estop them, from insisting upon its discharge by any thing previously done by the sheriff, and impose on them the task, if desired, of re-possessing themselves of the slaves taken under the execution. The principle we have stated, will not apply so as to discharge the judgment against the debtor to a greater extent where the goods are restored to him by his own consent, than where they are obtained by a wrongful act; and the case of Hunt v. Breading, [12 Serg. & R. 37,] which has been cited for the plaintiffs in error, does not maintain a contrary doctrine.

2. That judgments may be assigned, so as to transfer to the assignee an equitable interest, and authorise him to sue an execution thereon in the plaintiff's name for his benefit, has not, nor indeed can be, successfully questioned. The facts stated in the record, very satisfactorily show, that the judgment was regularly assigned; in fact, that unusual care was taken to perfect the arrangement; for it seems to have had the assent of both parties, and to have been intended to substitute Joice to all the rights and

remedies of the plaintiff. Whether the object of the assignee was really to aid the defendants, we have no means of judging, nor do we think it very important; for so far as the record imparts information, he has obtained a security for his money, which the law will protect. It is needless to consider the powers of an attorney at law, since the transaction we are examining received the sanction of the client.

3 and 4. In Harkins v. Clemens, [1 Porter's Rep. 30,] it appears that the sheriff returned a *fieri facias* "satisfied," and the clerk issued an *alias;* and the question was, whether the clerk had authority to issue the second until the return upon the first *fi. fa.* was modified by leave of Court—*It was held*, that if there was a mistake in the return, and the greater part of the judgment was unpaid, still, the clerk could not regularly issue another execution when full satisfaction had been returned on the first; and that the action of the Court was necessary to authorize it. Several of the cases cited for the plaintiffs in error, show such to be the law, but it is unnecessary to notice them particularly, as the decision of our own court is directly in point.

The return made by the sheriff, on the execution issued returnable to the spring term of 1841, does not literally pursue either of the forms furnished by the act of 1807, yet it states, in effect, either that the defendants had paid or adjusted the execution to the satisfaction of the plaintiff, or his attorney, or both of them; and that the costs and commissions had been paid to the sheriff. The fair inference from all this is, that the execution had been satisfied not only as to costs and commissions, but also as to the damages directed to be made. How the damages had been settled, whether by a cash payment, or in some other way, does not appear; be this as it may, the return is sufficiently potent to have arrested all subsequent executions until the Court had authorised them to issue.

In respect to *mesne* process it has been held, that the sheriff is not confined to the statute form in making his return, but his indorsement upon a writ, that the defendant had acknowledged service, was sufficient to bring the party into Court, though the statute requires that a copy of the process shall be left with the defendant. [Rowan v. Wallace, Judge, &c. 7 Porter's Rep. 171.] No reason occurs to us for the application of a rule less latitudinous in the execution of *final* process; the more especially as in

both cases the sheriff is subjected to severe inflictions, either for a false return, or the arrogation of power.

It results from the view taken, that it was competent for the Circuit Court to have permitted the sheriff to amend his return according to the truth of the case, but the executions issuing subsequent to the spring term of 1841, were *voidable at least*, and should have been quashed. The consequence is, that the judgment upon the motion to quash, is reversed, and the cause remanded.

JOHNSON v. JOHNSON.

1. Contracts made between trustee and *cestui que* trust, or between guardian and ward, soon after the latter comes of age, or one standing in the relation of guardian, are viewed with so much jealousy by courts of chancery, that they are voidable by the latter, if within a reasonable time, he seeks to avoid the contract. Such a contract can be supported only where the trustee or guardian, previous to the contract has made such a full and fair disclosure of all the facts or circumstances which have come to his knowledge as such, as to enable the other party to deal with him on equal terms—whether mere inadequacy would not be sufficient to set aside such a contract—*Quere*.
2. A confirmation of an invalid contract, to be operative as such, must be made with full knowledge of all the facts, the ignorance of which rendered the previous contract void, and with the intent that such act should confirm it.
3. The statute of limitations is as available in equity, as at law, in all cases where the courts have concurrent jurisdiction; but the mere staleness of a demand will prevent a court of equity from granting relief when no statute of limitations governs the case.
4. A purchase by a trustee from his *cestui que trust*, though open to enquiry within a reasonable time, puts an end to the trust.
5. A purchase by an administrator of one of the distributees, shortly after he came of age, of all his interest in his father's estate, the administrator having rendered no inventory of the estate, or stated an account, and the purchase being made at a grossly inadequate price, considered fraudulent and voidable at the election of the distributee, if application had been made for that purpose within a reasonable time afterwards, or within a reasonable time after obtaining knowledge of the fraud.

6. After the lapse of eleven years from the making of such a contract, a court of equity will not lend its aid to rescind it, and compel the administrator to account; the distributee having, when the contract was made, or soon afterwards, knowledge of circumstances sufficient to put him on enquiry, and six years afterwards being affected with the notice of the fraud.
7. Notwithstanding a fraud may have been committed, the bar, from lapse of time will be effectual, unless a suit is prosecuted within a reasonable time after the discovery of the fraud; and it is not true, at least in equity, that time does not commence running until after the discovery of the fraud.
8. When lapse of time is relied on by the defendant, if the complainant wishes to avail himself of any of the exceptions to the rule, he must put such matter in issue, either by amending his bill, or by a special replication.
9. An allegation in a bill, that the complainant was not advised, until long after the settlement was made, that a fraud had been practiced on him, is too vague and uncertain. The time when he acquired such knowledge should have been stated.

ERROR to the Chancery Court at Mobile.

This bill was filed in 1835, by the plaintiff in error against the defendant in error. The bill charged, that the defendant in 1816, became the administrator of the estate of the father of the plaintiff, and possessed himself of the slaves and other property of the deceased. That he also married the mother of the plaintiff, and reared him in his own family, and treated him very badly, giving him scarcely any education, and clothing him badly; that the estate was but little in debt; that the administrator never filed an inventory in the county court, or made a final settlement—but shortly after he became of age, induced him to come to a settlement, and representing the estate to be of but little value, obtained from the plaintiff, a conveyance of his interest in his father's estate for the consideration expressed in the conveyance, of one thousand dollars; that of this sum, he received only a negro girl, valued at three hundred and forty dollars, and the promissory note of the defendant for three hundred and eighty-seven dollars, which was all he ever received as his share of his father's estate. That he was not advised, until long afterwards, that his share in his father's estate, was much more valuable than the administrator had represented it to be, and when so advised, and frequently since, applied to him to come to a fair and just account. The prayer of the bill is for an account and settlement of the estate,

and that the defendant be decreed to pay him one-sixth part thereof, deducting the amount received, &c.

The defendant by his answer admits that he administered on the estate of complainant's father, and insists that he filed an inventory in the Orphans' Court, and that he did, so far as he was capable, correctly administer the estate, having paid between nine and ten thousand dollars of debts due by the deceased; and that he made just distribution among the heirs. That in June, 1824, after the complainant became of age, and had taken the counsel and advice of his friends, being of sound mind, capable of reading and writing, and being well acquainted with the property belonging to his father's estate, he agreed, in consideration of one thousand dollars, to convey, and did convey, to defendant, all his interest in his father's estate, except a claim to some negroes then in suit, which conveyance was attested by two witnesses, and states that he paid the full some of one thousand dollars to complainant, and also settled with him afterwards, for his share of the negroes in suit, and not conveyed by the deed aforesaid. He admits that the complainant resided in his family, and that he clothed and educated him. He further states, that in September, 1826, the complainant, with another distributee executed to him a bond, in the sum of twelve hundred dollars, with condition to indemnify him against any debts which might afterwards come against the estate—which is also made an exhibit. The answer also sets forth a particular description of the property of the estate, and the disposition made of it, the portions assigned to the other distributees, &c., and relies upon the great lapse of time which has intervened between the final settlement, and the exhibition as a bar to any proceeding in equity, &c.

A large amount of testimony was taken to show the value of the estate in 1824, which, from the view taken by the court, need not be stated. It was also proved, that in 1830, the defendant settled with the husbands of two of the sisters of complainant, and gave to each, eight negroes, one hundred head of horned cattle, a feather bed, &c., as their share of their father's estate.

It was also in proof, that the complainant, at the time, or shortly after the contract was made, was put upon his guard against the defendant, and advised not to settle with him.

Mr. Lesesne, with whom was Mr. Dunn—contended, that

the settlement made by the defendant with the plaintiff, was absolutely void, being shown to be fraudulent, by the proof, that the plaintiff had no means of knowing the value of his interest in his father's estate, and that the purchase by the defendant, of the plaintiff's interest, shortly after he came of age, at a grossly inadequate price, was a fraud. That in addition, he was *quasi* guardian, and that for that reason also, the contract was void.

That the statute of frauds was not a bar in equity, except where the corresponding remedy was barred at law; that no action at law was given for a distributive share of an estate, and therefore, there was no statute of limitations applicable to it; that mere lapse of time in those cases to which no statute of limitations applies, is always considered by a court of chancery in reference to the circumstances of the case, its object being the repose of titles and the peace of families.

That the rule, that time began to run from the discovery of the fraud, did not apply to cases of a purely equitable nature, as this was; that the allegation in the bill, that the fraud was not discovered until a long time afterwards, was sufficient; the case being purely an equitable one, it was for the defendant to fix the date of the discovery.

That the act relied on as a confirmation could not have that effect, as it appears to have been made in ignorance of the fraud, and without any intention that it should confirm the previous contract without which it could not be a confirmation of the former; that the pretended confirmation was itself a fraud, and the whole transaction the act of a designing, artful man, operating on a young, unsuspicious and ignorant man. They cited, 20 Johns. 576; 2 Porter, 58; 3 Dess. 238; 2 Fon. Eq. t. p. 259; Caro. Law Rep. 508; 3 Johns. C. 216; 7 ib. 126; Angell on Lim 356; 4 H. & M. 277; 1 Johns. C. 316; 2 S. & P. 70; 1 P. Williams, 549–572; 1 Vernon, 586; 3 Battle 218; 4 Dess. 422; 3 J. J. Marshall, 15; 4 Johns. C. 293; 1 Story's Equity, 337; 3 Yerger, 369; 1. Russ. & M. 418; 6 Vesey 270; 2 Schoales & Lef. 483; 1 B. & C. 445; 3 P. Williams, 143; 9 Vesey 297; Fonb. Eq. 260 4 Dess. 706; 6 Wheaton, 497; 3 Marshall, 316; 1 Jac. & W. 63; 2 Vesey, 272; 1 Edwards, 343; 2 Edw. 164.

J. Gayle, *contra*,—maintained that although the statute of limitations could not be pleaded, nor lapse of time insisted on,

where there was a continuing trust, yet if the trustee deny the right of the *cestui que trust*, and the possession becomes adverse, lapse of time from that period, constitutes a bar in equity.

That in a case where a contract is alleged to have been obtained by fraud, the statute of limitations is a good plea from the time of the discovery of the fraud, and it must be alleged in the bill that the fraud was not discovered within six years, or a waiver of the objection as to length of time, must appear on the face of the proceedings.

That in cases where courts of law and equity have concurrent jurisdiction, the statute may be pleaded in bar as a matter of right, and that in cases of equitable titles, equity adopts the statute of limitations as a positive rule, and requires relief to be sought within the period prescribed, whether of real or personal property.

That although a contract may be set aside for fraud, yet if it is deliberately confirmed, either expressly or by implication, equity will not interfere. In support of these positions, he cited, 7 Johns. C. 90; 2 Porter, 58; 8 ib. 212; 1 Madd. 256; 1 Story's Eq. 73; Story Eq. P. 585, 586, 389, 624; 2 Story's Eq. 735.

ORMOND, J.—This bill was filed by the plaintiff in error against the defendant in error, who was the administrator of plaintiff's father's estate for an account and settlement. The defence set up is, that after the complainant became of full age, in 1824, the defendant accounted with him and fully paid him all that was coming to him from his father's estate; that two years afterwards, he confirmed the settlement so made, and acquiesced in it, until the filing of the bill in 1835, and the defendant relies upon the settlement so made upon the subsequent confirmation, and upon the lapse of time, as constituting a bar to the relief sought by the bill.

In considering the question of the fact merely of a settlement having been made between the parties, the relation which they bore to each other at the time, and that which had previously subsisted between them, will have an important bearing upon it. The defendant as administrator was a trustee for the plaintiff, and not only so, but having married his mother, and reared him in his family, he was *quasi* guardian and stood towards him *in loco parentis*.

Contracts made by persons, between whom the relation of trus-

tee, and *cestui que trust* exists, are viewed with so much jealousy by courts of chancery, that they are voidable by the latter, if within a reasonable time, he seeks to set the contract aside, and can be supported only, when the trustee previous to the contract, has made such a full disclosure of all the facts and circumstances which have come to his knowledge, as trustee to the *cestui que trust*, as to enable the latter to deal with him on equal terms. Even then, in the opinion of Lord Eldon, in Coles v. Trecothick, [9 Vesey, 246,] if there be any inadequacy of price, the contract cannot be maintained; [Campbell v. Walker, 5 Vesey, 678; Saltmarsh v. Beene, 4 Porter, 293.]

The same rule upon analogous reasoning, applies to settlements made by guardians, or persons occupying that relation with their ward, shortly after their coming of age. The superior knowledge of the subject of the contract, and the control which one of the parties has always been accustomed to exercise over the other, prevents that contestation between the parties, which is the principal, if not the only security against unfair dealing. In such cases, the parties do not meet on equal terms, it is therefore almost, if not quite, a matter of course to open the account, or set aside the contract, if seasonably applied for, even when there has been no fraud, or circumvention, if a reasonable doubt exists of the justice of the account. [Hatch v. Hatch, 9 Vesey, 297; Revett v. Harvey, 1 Sim. & Stu. 502.]

The facts of this case are such as to leave but little if any doubt on our minds, that the sum received by the plaintiff, at the settlement made with the administrator, as his share of his father's estate, was grossly inadequate. There is great difficulty in ascertaining the precise value of the estate in 1824, when the settlement was made. No inventory was filed, at least none is produced, or its absence accounted for, and none appears among the records of the Orphans' Court. The answer of the defendant as to the value of the estate at that time, is vague and uncertain, and the estimate of the witnesses exceedingly variant. It is a very suspicious circumstance that no account in fact ever appears to have been stated, but the value of the interest of the plaintiff ascertained from conjecture, or taken at the estimate of the defendant. It is therefore highly probable that the sum received by the plaintiff, at the settlement, fell far short of that to which he would have been entitled upon a fair and just statement of the

account. He has then, upon the principles previously stated, a right to call on the defendant to re-state the account, if he has not, by his subsequent acts, and by his *laches* waived or lost it.

The confirmation set up by the defendant cannot avail him. A confirmation to be operative as such, must be made with full knowledge of all the facts, the ignorance of which, rendered the previous contract invalid, and with the intent that such act should confirm the invalid contract. [Chesterfield v. Janssen, 1 Atkins, 354; Cockerell v. Cholmely, 1 Russ. & M. 418; Butler v. Haskell, 4 Dess. 712.] The transaction relied on here as a confirmation, wants every essential ingredient of such an act, and appears to have been intended for an entirely different purpose—its avowed object being merely to provide an indemnity for the defendant, if debts should subsequently come against the estate. If at the time it was contemplated by the defendant that this bond of indemnity should exert any influence upon the previous contract, such design should have been disclosed to the plaintiff, which does not appear to have been done.

The only question in the cause upon which a difference of opinion could arise, is, whether the *laches* of the plaintiff, in not seeking until after the lapse of eleven years, to disturb his settlement, made as is stated, both in the bill and answer, after he had attained to his majority, ought not according to the principles which govern courts of equity, prevent him from obtaining relief.

It is well settled at this day, that the bar of the statute of limitations is as available in chancery, as at law, in all cases where these courts have concurrent jurisdiction. [Kane v. Bloodgood, 7 Johns. C. 122; Maury's adm'r v. Mason's adm'r 8 Porter, 211; Wood v. Wood, 3 Ala. Rep. 756.] In the case last cited, the bill was filed by a residuary legatee against the executors for an account and settlement of the estate, and this court held, that as by our statute, an action of account was given to a residuary legatee, against the executor, and as that action was barred by the statute of limitations, the bar was effectual to prevent a suit in chancery having the same object.

The bill in this case is filed by a *distributee*, who is not embraced by the terms of the statute just cited, although in reality, no conceivable difference exists between the two cases, except that one claims under a will, and the other by operation of law. As however, no action at law is given for the recovery of a distri-

butive share of an estate, there is no statute of limitations applicable to this case, unless the time within which an action could be instituted on the administration bond, should be held to apply a point not necessary to be determined in this case.

The doctrine that the *staleness* of a demand will prevent a court of equity from granting relief, where no statute of limitations directly governs the case, is peculiar to that court, and has been adopted by it, for the preservation of the peace of society. [2 Story's Com. on Eq. 735.] This rule of equity is stated with great force and precision by Lord Camden, in Smith v. Clay, [reported in a note in 3 Brown's C. 639.] "A court of equity which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, when the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but *conscience, good-faith* and *reasonable diligence;* where these are wanting, the court is passive and does nothing." [See also Hovenden v. Lord Annesley, 2 Sch. & Lef. 634.]

It is quite obvious from the reason of the thing, that no precise rule can be laid down in advance, applicable to this class of cases. Each must, to some extent, depend on its own circumstances, and will be controlled or modified by them, and by analogy to other known and settled rules of law. The subject in dispute will also materially affect the question, as by the statute law, a longer period of time is allowed for bringing suits for the recovery of land after the cause of action accrues, than for personal property. So a court of chancery would grant a longer indulgence when the matter in dispute was land, than when it was personal property, before it would consider it so antiquated as not to be entitled to the aid of the court. The principles applicable to such cases, are admirably illustrated by the Master of the Rolls, in Chalmer v. Bradley, [1 Jac. & Walker, 51.]

It is certainly the general rule that the statute of limitations will not run against a *subsisting* and *continuing* trust, but cases may exist, in which, notwithstanding the trust has never been put an end to, it would after a great lapse of time, be the duty of a court of chancery, to refuse its aid, and presume from such unreasonable delay, either satisfaction or abandonment of the claim; and such, I understand to be the decision of the chancellor, in the case last cited.

These presumptions do not proceed from a belief by the court that the things presumed to be done, have actually taken place. [Eldridge v. Knott, Cowp. 214; Hillary v. Waller, 12 Vesey, 252; Gibson v. Barremore, 5 Johns. C. 550.] "These presumptions (says Chancellor Kent,) to be drawn by courts in the case of stale demands, are founded in substantial justice and the clearest policy. If the party having knowledge of his rights, will sit still, and without asserting them, permit persons to act as if they did not exist, and to acquire interests and to consider themselves as owners of the property, there is no reason why the presumption should not be raised."

This, however, is not the case of a subsisting trust. By the sale and conveyance by the plaintiff, of his interest in his father's estate to the defendant, an end was put to the trust which had previously subsisted. "In purchases by a trustee from his *cestui que trust*, an act is done which though open to enquiry, puts an end to the relation between them; if the purchase stands, he is no longer a trustee, the other party has been permitted to become the beneficial owner. He cannot however, by any act of his own, without communication with his *cestui que trust*, denude himself of the character of trustee, till he has performed the trust." Chalmer v. Bradley, [1 Jacob & Walker, 51.] It has been shown in a previous part of this opinion, that such a transaction is suspicious, and may generally be set aside by the *cestui que trust*, if application for that purpose is made within a *reasonable time*—has that been done in this case?

We entertain no doubt that the time which has been permitted to elapse in this case, eleven years, should prevent a court of chancery from entertaining the cause. From the time the contract was made, the defendant has held and claimed the slaves and other personal property thereby conveyed as his own, with the full knowledge of the plaintiff. The necessary tendency of this long delay must be to increase, greatly, the difficulty if not to render it impossible now to state the account correctly, which as commenced in 1816, would go back a period of twenty-seven years. The death of witnesses, the loss or destruction of vouchers and other *memoranda* of such ancient transactions, which must necessarily have taken place during that long space of time, renders it highly improbable, if not impossible, that the account

should now be justly stated. Indeed the long silence of the plaintiff was well calculated to bury the whole matter in oblivion.

There is no hardship or injustice in requiring a party to assert his rights within a reasonable time after he becomes cognizant of them, and all legal impediments are removed: whilst on the other hand, the repose of society imperiously demands, that unreasonable delay in bringing suits, should not be tolerated. The conviction, that the best interests of the community are thereby promoted, has been constantly gaining strength. The legislature of this State, at its recent session, reduced the time within which suits may be brought for the recovery of real property, from twenty to ten years; and it would be strange if a court of chancery would permit a suitor to create for himself a longer limitation, in a suit for personal property, than the law would allow, if the subject of the suit were land.

It must however, be admitted, that many of the older cases hold a language different from this, especially in cases infected with fraud. Thus, Lord Northington, in Alden v. Gregory, [2 Eden, 280,] is reported to have said, that "no delay should purge a fraud," and granted relief after a great lapse of time. So in Pickering v. Lord Stamford, [2 Vesey, 279,] Lord Alvanley with great reluctance, and apparently against his own convictions, decreed an account after the lapse of forty years, but that was the case of a *continuing* trust, and the party ignorant of his rights. These cases are not now considered law in England, as is shown by the opinion of Lord Chancellor Hart, in the very recent case of Byrne v. Frere, [2 Molloy, 157.] Having stated the law to be different from that advanced in Alden v. Gregory, he says: "This was held differently in Alden v. Gregory, [2 Eden, 280.] But that case is an exception, and it has hardly been followed since Lord Northington's time. The passage there is very strong. He says, 'will delay ever purge a fraud;' and he answers, 'never while I sit here:' but that extreme doctrine, which indeed, his own case did not come up to, although we find it for some time kept alive in the *dicta* of judges, was not acted upon after Lord Northington ceased to sit." He proceeds to comment on succeeding decisions, and says that the decision made in Pickering v. Lord Stamford, would not be followed now, and that the decisions of Morse v. Royal, and Hillary v. Walker, reported in 12 Vesey, 239, 377, have been held since, to be of little authority.

It will be found on examination, that most, if not all the cases in which relief has been granted, after a great lapse of time, were either cases of fraud or *continuing* trusts, in which the parties were ignorant of their rights, or the matter in controversy was land, in regard to which, by analogy to the statutes of limitation, a longer delay has always been tolerated by courts of equity, than when it was personal property. Thus the late case of Bennett v. Colley, [2 M. & K. 225,] was the case of a trust, and the party was ignorant of his rights; but the main ground of the decision was, that he could not have filed his bill sooner than he did.

In Watson v. Toom, [5 Madd. 40,] and Purcell v. Macnamara, [14 Vesey, 91,] relief was given expressly on the ground of the ignorance of the parties of their rights.

Pickett v. Loggin, [14 Vesey, 215,] is a very peculiar case. The delay was twelve years, and the object of the suit was to set aside a conveyance of land obtained by undue influence operating on the abject poverty of the plaintiff, which was so great that a bill filed four years after the transaction was abandoned for want of means to carry it on.

In Murray v. Palmer, [2 Schoals & Lefroy, 474,] after the lapse of twelve years, a conveyance for land was set aside as having been fraudulently obtained. The chancellor admitting the difficulty from lapse of time, granted relief principally on account of the ignorance of her rights. In the subsequent case of Webb v. Korke, 672 of the same book, where the delay was about eleven years in an application to set aside a lease for 999 years, improperly obtained, the chancellor admitted that the objection would be available if the lease had been acted on by the parties, which he showed was not the case.

In Bergen v. Bennett, [1 Caine's Cas. 1,] the court refused to set aside a purchase by a trustee of mortgaged premises at his own sale, after the lapse of sixteen years. In Ray v. Bogart, [2 Johns. Cases, 436,] where eleven years had elapsed without a settlement of partnership accounts; the court refused to entertain a bill. In Rayner v. Pearsall, the court refused to compel the administrator of an executor to account after the lapse of twelve years; and in Bertine v. Varian, [1 Edwards, 347] refused to compel the guardian and administrator of a guardian to account after a delay of eleven years.

It would be a useless consumption of time, to attempt even a

notice by name, of all the cases upon this question. It may, however, we think, be stated as the result of the modern authorities at least, that even where there is a subsisting trust, unless the party was ignorant of his rights, courts of equity will, after a great lapse of time, presume a satisfaction. That if the possession of the *trustee* becomes adverse to the *cestui que trust*, lapse of time from that period may constitute a bar in equity; and this is recognised as the present state of the law upon this subject, in Hatfield v. Montgomery, [2 Porter, 76.]

In this case, as already stated, the trust was destroyed by the contract between the parties. However suspicious that transaction may be, it must, until it is set aside, put an end to the relation which had previously subsisted between them.

But it is insisted that this contract was itself fraudulent, and is therefore void. It by no means follows, that because the contract was fraudulent, that it is therefore a nullity; even a fraudulent contract may be ratified by express agreement, or by long and unreasonable acquiescence in the assertion of rights thereby acquired, with knowledge of the facts. And if during the whole or the principal part of the time which has been permitted to elapse in this case, the plaintiff was cognizant of his rights, and permitted the defendant to act and deal with the property conveyed as his own, he must in this court, be presumed to have abandoned them.

To come to a proper consideration of this part of the case, it is necessary to ascertain what is the case made by the bill. The bill charges that the plaintiff "was not advised until *long after* the settlement was made between himself and said James; that his claim to his share and part of his father's personal estate and effects was greatly more valuable than the said James had represented the same to be, and that he had been grossly and fraudulently imposed on in said settlement by said James; and your orator immediately after he was so advised, offered said James to come to a fair and just account, &c." If the design of this allegation was, by anticipation, to remove the objection arising from lapse of time, it must be unavailing. The allegation that he was not advised of the fraud *until long after the settlement*, is too vague and uncertain to be the basis of any action in a court of justice. One man might consider one year, or indeed a shorter period, a long space of time, whilst another might not consider ten

years as entitled to that appellation. In Bertine v. Varian, [1 Edwards, 343,] a similar allegation, in a bill to prevent the operation of the statute of limitations, was rejected for uncertainty.

When lapse of time is relied on by the defendant, if the complainant wishes to bring his case within any of the exceptions, he must amend his bill or file a special replication, putting such new matter in issue. [South Sea Comp. v. Wymondsell, 3 P. Wms, 145; Bertine v. Varian, 1 Edwards, 343; Maury's adm'r v. Mason's adm'r, 8th Porter, 211; Hatfield v. Montgomery, 2 Porter, 58.] And as this has not been done, evidence could not be received to repel the presumption arising from lapse of time.

We are however of opinion, that if the case made by the bill, admitted of proof of facts to excuse the delay in bringing the suit, that it does sufficiently appear that the plaintiff was apprised of the fraud, if not at the time the contract was made, at least soon afterwards.

The law upon this subject is usually stated, that *time does not commence running until after the discovery of the fraud.* However true this may be, as it respects the plea of the statute of limitations, in a court of law, its correctness may well be doubted, when applied to a suit in chancery in a case where the court acts upon its own peculiar doctrine of discouraging stale demands. If a considerable period of time has elapsed before the discovery of a fraud, the efflux of time already past should quicken the diligence of one who desired to avoid a contract for that cause, especially in a case, where by the exercise of any diligence, the true state of the case might have been known at an earlier period.

In the late case of Byrne v. Frere, [2 Molloy, 157] already referred to, the chancellor holds this language: "Now, length of time, of more than twenty years, bars even in a case of fraud, if the party to be barred has become, within any reasonable period, cognizant of the facts. For if there is the full period of twenty years, it is immaterial that, during much of that time, he had no notice of the fraud. It is a common mistake to suppose that *time only begins to run from notice of the fraud.* If the full twenty years are run, and the party has during a reasonable period within that time been cognizant of the facts constituting the fraud, always supposing no disability proved, by which I mean legal disability, and not want of means or poverty, he is barred. This

court will give him no aid. It will refuse to be active, even to the extent of compelling a discovery."

In this case, it will be observed, that when the chancellor speaks of *twenty years* being a bar, he has reference to the statute of limitations barring an entry into lands after that period, and which, by analogy, applied to the case before him; but the case is a full authority to show that in equity, the computation of time is not made from the discovery of the fraud, but that if one having knowledge of the fraud will still lie by and permit the full time to run, within which, if no fraud existed, the court would not interfere, the fact of fraud will not entitle him to relief, although during much of the time, he had no notice of the fraud.

Here, the plaintiff, as appears by the proof, and the internal evidence afforded by the case itself, had such notice previous to the contract being made, as should have put him on enquiry, and subsequently, full and complete notice.

The contract now sought to be set aside, appears not to have been hastily or unadvisedly made. The relations of the plaintiff were fully apprized of the value of the property which the defendant had in possession, as administrator, as is fully shown by their testimony. It also appears that they considered that the defendant had treated the plaintiff badly during his minority, and it would be a fair presumption that they advised him of his rights when he came to years of maturity: such appears from the testimony to have been the facts. The defendant in his answer, denying that the plaintiff was ignorant of his rights, says that the settlement was made after the plaintiff had taken the counsel and advice of his friends, and that he well understood what property belonged to his father's estate, and had been often told of its value and amount. From the testimony of John D. Johnson, it appears that the plaintiff informed him that he had been advised by his relations, and persons of intelligence, not to settle with the defendant. Joseph Johnson, another witness, deposes, that plaintiff told him previous to the settlement, that he did not intend to settle with the defendant, unless he settled fairly. After the settlement, he expressed his satisfaction with it, and has done so repeatedly since. In addition to this, it must be added, that the plaintiff had been familiar, from his boyhood, with the property of his father's estate, in the possession of the defendant, consisting as it did, almost entirely, of slaves.

These facts would have opposed no obstacle to the rescision of the contract, if a seasonable application had been made for that purpose, but they are potent against the application after such long delay. As they show satisfactorily that the plaintiff was put on his guard—that he always had the means of ascertaining the facts—the same means indeed were within his reach, and the same facts were within his knowledge, when the contract was made, or soon after, which existed at the time of the filing of the bill. In 1830 the defendant settled with the husbands of two of the plaintiff's sisters, and paid them a sum as their share of their father's estate, greatly in amount beyond what he had paid the plaintiff. If before, he only had doubts whether the settlement made with the defendant, was correct, here was a fact which should have opened his eyes to the truth. Yet he lies by five years longer, and finally, as appears from the testimony, yielded to the importunity of his friends, when the suit was instituted.

It is not credible that the plaintiff was ignorant of those facts which all the other members of his family were cognizant of, being, as it appears he was, in intercourse with them, and in fact, it appears that they advised him against the settlement, when made, and expressed dissatisfaction with it afterwards. The conclusion, therefore, is irresistable, that he was as well acquainted with the facts, upon which relief is now sought, when the contract was made, or soon afterwards, as he was when the bill was filed.—Nor is there any allegation in the bill entitled to notice, that such is not the fact. The delay which has taken place cannot be ascribed to the defendant, but is the voluntary act of the plaintiff. If the knowledge of the plaintiff of unfairness in the settlement, previous to the settlement of the defendant with the sisters of the plaintiff, could be considered as amounting to conjecture or suspicion only, certainly after that event he must have known the value of his interest, yet he lies by five years longer. According to the decision of Byrne v. Frere, (previously cited,) in computing the time, this must be added to the previous delay, even if that was the first distinct intimation of the fraud, which is hardly possible.

This may be, and probably is, a case in which injustice has been done to the plaintiff, but we feel ourselves constrained to hold, that his *laches* has been so great, as to require this Court not to set so pernicious a precedent, as would be established by granting the relief sought by the bill.

In the argument of the cause, some stress was laid upon the ignorance and supposed imbecility of mind of the plaintiff. There can be no doubt that when the contract was entered into, the plaintiff was an ignorant young man, with but little knowledge of the world; and although it does not appear, and indeed is not alledged in the bill, that his incapacity was so great as to authorize the rescission of the contract for that cause alone; it would certainly have been an important fact if a seasonable application had been made. It can exert no influence whatever now. This decision is not based on the ground that the contract is fair and equal between the parties. On the contrary, we do not doubt that a most unfair advantage was gained by the defendant, but it is founded on the acquiescence of the plaintiff, with knowledge of his rights in this imposition for such a length of time that to permit him now to unravel the transaction, would in effect be to permit him to commit a fraud on the defendant. As to his capacity, it appears that he is a man of ordinary intelligence, having, as appears from the testimony, been the owner of a store, and engaged in the business of merchandize.

The decree of the chancellor must be affirmed; but this is not considered a proper case for costs. Each party will pay his own costs in this court.

GOLDTHWAITE, J., *dissenting*.—In my judgment, the complainant is entitled to all the relief sought by his bill, so far as he claims as a distributee of his father's estate; and he would also be entitled to distribution for his share of his deceased brother's portion, by taking out administration on that estate. I also consider that both these accounts should be stated upon the most rigorous principles known to courts of equity. I shall endeavor, as briefly as possible, to give the reasons which lead me to these conclusions.

The defendant is not to be considered merely as the administrator of the estate committed to his charge, because, in addition to the duties imposed by this office, there was the superadded obligation arising out of his relation to the complainant. The defendant, after his intermarriage with the complainant's mother, stood to him in *loco parentis;* yet we find every obligation violated, and the child that should have been cherished and kindly treated, banished from the house of his mother, and brought up

almost as a slave; and this, notwithstanding he was entitled to an estate amply sufficient for his support. For eight years the complainant is suffered to remain in this condition, and when on the eve of his majority, but yet during his actual minority, the defendant makes a pretended settlement, and takes from him a conveyance of all his rights for a grossly inadequate consideration. This transaction is considered by all the members of the court as fraudulent, but a majority of the judges hold that the *laches* of the complainant has been such, as, in connection with the subsequent transactions between these parties, to debar a court of equity from listening to his complaint.

I apprehend that no case whatever can be found where such a transaction as this has been sustained by a court of equity. The universal rule is, that if a trustee will deal with his *cestui que trust* he must always be prepared to shew that the dealing is entirely fair, made upon the fullest communication of all the facts and circumstances connected with the trust property, and upon the payment of a consideration fully adequate. It does not rest with the *cestui que trust* to shew by evidence that the dealing is unfair, or that an advantage has been taken of him; but the *onus* is cast on the trustee to support it. A multitude of cases might be cited in support of this principle, but one of recent date will be sufficient for reference, [Hunter v. Atkyns, 1 Coop. S. C. 464. See 8 Cond. E. C. 497.]

I presume the same principle applies to any pretended confirmation of any such dealing subject to impeachment, that is, that there must be full and complete information of all the circumstances of the trust estate; but beyond this, the act which is relied on as a confirmation, must be done with the intention of confirming the previous act, and with the knowledge that it might be so impeached in a court of equity. [Murray v. Palmer, 2 Sch. & Lef. 474, see 486; Morse v. Royal, 12 Vesey, 355, see 494; Cockerell v. Chalmeley, 1 R. & M. 425, see 4 Cond. E. C. 494.]

What then are those acts which are supposed to be confirmatory of the fraudulent settlement? In 1825 the defendant paid the residue of a note which was given when the former transaction was consummated, and he then procured the complainant to endorse on the note, or to sign an endorsement so made, that the payment was in full of the balance due him of negro property belonging to the estate of his father, and of other things of a per-

sonal nature. Now this seems to me to be nothing but a contrivance, as is said in Wiseman v. Beake, [2 Vernon, 121,] to double hatch the cheat. This note bears the same date, and evidently was given when the settlement was made, and I have no doubt, was a part of the consideration given for it, though the defendant asserts that it was the consideration for the return of the complainant's interest in the slaves Charles and Sue, and her issue, without paying for which the complainant would come to no final settlement. This assertion is utterly inconsistent with the return exhibited, for by that it appears these slaves were expressly excepted from the settlement, as they were then involved in a chancery suit. A previous part of the answer asserts, that after this suit was disposed of, the defendant settled with the complainant for his share of these slaves. The receipt made on the back of the note, is a release in its terms, not only for all the negro property, but is also for all other things of a personal nature; the former release too, contains the same general expressions, yet it is entirely evident that the cattle belonging to the estate were not then divided. Certainly this mode of taking releases on the back of notes, is a very suspicious way of confirming a fraudulent transaction, or of conveying the necessary information to enable one to act advisedly. When the defendant is pressed, as I infer, for a division of the cattle, he makes the opportunity to involve the complainant in another writing, by which he agrees to bear his proportion of any debts which may subsequently come against the estate. This is more than ten years after the grant of administration, and I have much difficulty in conceiving what claims could then exist for which the defendant, as administrator, could then be made liable. But however this may be, the paper carries intrinsic evidence that its execution was induced by the idea that otherwise no division could be had. The declarations made by the complainant, subsequently to the settlement, that he considered it as fair, and that his uncle had dealt justly by him, are consistent with his want of information with respect to the true condition of the estate, but are utterly inconsistent with the feelings which he must have entertained, if he had known its true value. Nothing, in my opinion, is more clear from the evidence, than that he had no suspicion that he had been defrauded, until the period when the defendant settled with the husbands of his two nieces. This was in 1830; but even at

that time the complainant had not the necessary information to enable him to ascertain the extent to which he had been defrauded.

Being satisfied that the supposed confirmatory acts and declarations have no weight in this case, I will proceed to consider the lapse of time. The complainant was born in July, 1803, and consequently came of age in that month, in 1824. This bill was filed, as I infer from its first continuance, in the summer vacation of 1835; therefore, eleven years had elapsed from the period of his majority, and a few days beyond that from the time of the settlement, that having been made the 18th of June, 1824.

I think there has sometimes been a great misapprehension of the celebrated decisions of Lord Camden, in Smith v. Clay, [Amb. 645,] but better reported in 3 Bro. C. C. 639; and of Lord Redesdale, in Hovenden v Lord Annesley, [2 Sch. & Lef. 633.] Neither of these most eminent men intended to be considered as saying that all cases were within the influence of time, for the judgment of the first is given with reference to a bill of review, and the case of a concealed deed, is by him expressly excepted; and in the opinion of the last, it is conceded, [see page 633,] that a trustee *in possession of the trust estate* can never avail himself of the lapse of time as against his *cestui que trust*. The same admission is made by Sir William Grant, in Beckford v. Wade, [17 Vesey, 88—see 97.] It is only cases of *constructive*, and not of *direct* trust, in which time operates *as a bar*. It is true that even in cases of direct trust, time has its influence, but it is only by way of evidence, in the same manner as length of time would create the presumption of payment of a bond at common law. [Morse v. Royal, 12 Vesey, 355—see 377.] Doubtless, there was a period in the court of chancery of England, when the notion of trust and fraud was carried to a very improper extent, but the doctrines promulgated by Lords Camden and Redesdale, were not new even in that court; for Lord Macclesfield, in Lockey v. Locky, [Prec. in Chan. 518] had long before recognized and acted on the true rule. That was the case of a constructive trust, one having secured the profits of an infant's estate, after six years, was held, entitled to the protection of the statute of limitations. Whether the same rule could be applied to an actual guardian, I need not consider, further than to say, that in my opinion, it could not, at any rate, until the relation was dissolved, and the estate surrendered. I admit that the effort of courts of equity, ought al-

ways to be to bring all cases within general rules, so that as little may be left to individual discretion as may be, and that such is the constant course of judicial decision; but I apprehend there is, or can be no middle ground, between bringing every case within the analogy of the statutes of limitation, and the similar analogy of common law presumption, or leaving it to the broad discretion of each individual judge. I think the English chancellors, (and I do not speak of them as differing from American judges, but because an examination of the whole number of cases on this subject would make a volume) have placed this subject on its true foundation; and when they speak of each case, resting on its own circumstances, to let in or exclude the bar of time, when the case is not controlled by the statute, they are to be understood as speaking of the circumstances as matter of evidence, from which a satisfaction might be presumed, a confirmation inferred of an impeachable settlement, or if necessary, a release. [Morse v. Royal, *supra;* Hillary v. Waller, 12 Vesey, 239; Hercy v. Dinwoody, 2 Vesey, jr. 87.] I think it very clear that such was the opinion of Lord Redesdale, as he gave the decree in the case of Murry v. Palmer, [2 S. & Lef. 474,] only a very few months in advance of that in Hovenden v. Lord Annesley, and then granted relief after a lapse of 12 years, and when the plaintiff had each year, received the interest of the purchase money of a sale made by her trustee in violation of her rights.

In the very recent case of Bennet v. Colley [2 M. & R. 225. See 7 Cond. E. C. 342,] it was held that thirty years acquiescence of a party ignorant of his rights, was neither a waiver, or a confirmation of any thing done against him. The object of the suit was to obtain compensation out of the trustee's estate for a breach of duty.

The case of Alden v. Gregory, [2 Eden, 280,] is in all material features, precisely similar to this, and there a conveyance was set aside, and account decreed after a lapse of more than 40 years.

Cases are very numerous also, in which accounts have been unravelled as between trustee and *cestui que trust*, after great lapse of time, upon allegation of fraud or mistake. [Whatton v. Toone, 5 Madd. 53, after sixteen years; Vernon v. Vawdry, 2 Atk. 119, twenty-three years; Pickering v. Stamford, 2 Vesey, jr. 272, an account decreed in favor of next of kin, against executors after forty-one years; Lewis v. Morgan, 5 Price, 42,

accounts of thirty years, were unravelled; Purcell v. Mcnamara, 14 Vesey, 91, & Pickett v. Logan, ib. 285, deeds were set aside after fifteen years.] In Whalley v. Whalley, [1 Merrivale, 436,] it is admitted that time is not a bar when the *cestui que trust* seeks to set aside a deed for the fraud of his trustee and against him.

This recital of cases might be greatly extended, but I consider them as sufficient to show that time is no bar whatever to such a suit as this, and that unless a satisfaction can fairly be presumed, an account must be allowed.

Independent of any decision upon this subject, it seems to me, that when it is conceded that the mere delay of a distributee to call for an account, will not impair his claim upon the administrator, it would be monstrous to suppose he could effect his discharge by a fraudulent settlement, for that would be giving premiums for fraud.

TAYLOR v. BASS.

T and L, were indebted by a joint and several note to D & Co. and this is reduced to judgment, all the partners suing. B, one of this firm is indebted individually to T.—*Held*, in a suit by T, for the use of another, against B, that the latter cannot set off the joint judgment recovered by the firm of which he is a partner.

Writ of Error to the County Court of Tallapoosa county.

Assumpsit by Taylor, for the use of Berry against Bass, on a promissory note made by him, and due 22d January, 1840. At the trial, the defendant gave in evidence, under the pleas of payment and set-off, a joint and several note made by the nominal plaintiff Taylor, and one Lovelace, payable to Dunn & Co. and due the 2d January, 1840. Bass, the defendant, was a partner of this firm, and the note was reduced to judgment in the names of all the partners. This judgment was offered and admit-

ted as a set-off. The plaintiff excepted, and now assigns the same as error.

GUNN and GRESHAM, for the plaintiff in error.
REESE, *contra.*

GOLDTHWAITE, J.—The debt allowed as a set-off, by the court below, was due to the defendant and another, as partners, and there is nothing in the record to show any assent of the one, that the other should appropriate it to his own use or sole benefit.

In principle, this case cannot be distinguished from that of Pierce v. Pass, [1 Porter, 232,] where it was held, that the individual debt of one partner could not be set-off against a debt due to the firm. [See also, Von Pheel v. Connelly, 9 Porter, 452.]

The statute, [Digest, 281,] allows mutual debts to be set-off, and if the relative situation of these parties is reversed, it will be seen there is no mutuality whatever; in such a case, Dunn & Bass, as partners, would be plaintiffs, and Taylor defendant, and the latter would not be allowed to set-off the debt due from Bass, against the suit of the firm. The reason why this would not be allowed is, that by it the partnership assets would be diverted and appropriated to the payment of one partner's individual debts, and thereby the creditors of the joint concern, as well as the other partner, would be involved with the payment of debts with which they had no concern, and for which the other partner is in no manner liable.

The attempt to appropriate the partnership debt to the payment of the individual debt is equally apparent in the case before us, and however the case might be if the assent of the other partner was shown before suit, the set-off cannot prevail under the facts disclosed.

Judgment reversed and the cause remanded.

PRUITT, ET AL. v. STUART.

1. The jurisdiction of justices of the peace, is limited to cases in which the amount in controversy does not exceed fifty dollars; and where a judgment rendered by a justice is appealed from, the recovery in the appellate court, should not exceed the sum of fifty dollars, with interest from the time the primary judgment was rendered. But where the judgment on appeal is consequent upon *a verdict*, it will not be reversed on error, because it is rendered for a sum greater than that which limits the jurisdiction of justices, with interest from the time stated.

WRIT of Error to the County Court of Lowndes.

This was a suit commenced before a justice of the peace, by the defendant, for the recovery of a debt as stated in the summons, amounting to forty-seven 50-100 dollars. A judgment being rendered by the justice for the sum of fifty dollars besides costs, the proceedings were removed by *certiorari* to the County Court, where the plaintiff filed a formal declaration, alleging that two of the plaintiffs in error, were indebted to him on the first day of January, 1839, in the sum of forty-seven 50-100 dollars, for work and labor done, &c. The cause was tried by a jury, who returned a verdict for the plaintiff below, assessing his damages at fifty-eight 90-100 dollars; and on this verdict a judgment was rendered against the parties declared against, and their co-plaintiff, who was their security for the successful prosecution of the case in the County Court.

COOK, for plaintiff in error.
J. P. SAFFOLD, for the defendant.

COLLIER, C. J.—It is insisted that the County Court could not render a judgment for a sum above the jurisdiction of the justice of the peace, before whom the cause was instituted, and that it should not have entertained the case.

The jurisdiction of justices of the peace, is expressly limited by law, to cases in which the amount in controversy does not exceed fifty dollars. And where a suit seeking the recovery of money, originates in one of these inferior tribunals, if it is remov-

ed to the Circuit or County Court, the judgment should not exceed the amount for which the primary jurisdiction was authorised to proceed, unless it be increased by the addition of interest, accruing since the rendition of the judgment appealed from. If the law were otherwise, a party having a demand, for a sum far beyond the limitation prescribed, might cause a warrant to be issued by a justice, suffer a judgment to be rendered against him by an intentional failure to adduce any proof, and immediately prosecute an appeal, and recover all he claimed. A state of things, which would be in itself, an intolerable perversion of justice.

But as the jurisdiction of the County Court is not limited by the amount in controversy, in cases in which suits are originally brought there, it is allowable for a party, whose case comes up by appeal, to impliedly or expressly assent to the decision of a controversy, which the primary court is incompetent to adjust. The familiar rule, that consent cannot give jurisdiction, does not inhibit such a proceeding.

In the present case, the plaintiff claimed a sum of money by his declaration, which, with the addition of interest from the time it was alleged to be due, amounted to more than that for which the verdict was returned. No objection was made in the County Court to the judgment, and we think the case of Moore v. Cooldige, [1 Porter's Rep. 280,] which has been repeatedly recognized, is an authority to show that it cannot be reversed on error. There, it was objected to the judgment that the verdict on which it was rendered, was for an amount unauthorised by the cause of action alleged in the declaration; and such really appeared to be the fact, yet the court held, that the judgment was regular, and if the verdict was for two much, it should have been set aside or corrected in the Circuit Court.

The judgment of the County Court is affirmed.

STEWART & PRATT, SURV. PARTNERS, v. FRAZIER.

1. On a deposit or bailment of money, to be kept without recompense, if the bailee without authority, attempt to transmit the money to the bailor at a distant point, by the public mail or by private conveyance, and the money is lost, they are responsible to the bailor.
2. The loss of the money from such a cause, is not, however, a conversion, and the bailees are not liable to an action for the money until a demand is made for it. But if the bailees, on being apprized of the loss of the money, refuse to pay, or deny their responsibility, the jury would be authorized to infer a demand and refusal.

ERROR to the County Court of Sumter.

This was an action of assumpsit, brought by the defendant against the plaintiffs in error.

Upon the trial, it appeared that the plaintiff sent to the defendants, commission merchants in Mobile, a negotiable note, to be discounted in one of the banks of that city, and the proceeds to be received by them for his use. That the note was discounted, and the proceeds thereof, the amount sued for, received by the defendants. There was no proof that any instructions were given to the defendants by the plaintiff, as to the mode of transmitting the funds, or as to any other disposition of them. It further appeared, that the defendants had placed the money in the hands of one Van Houten, reputed to be an honest man, in an envelope addressed to a house in Livingston, Alabama, near to the plaintiff's residence, to be delivered to him; but the money did not come to the possession of those to whom it was addressed.—There was no proof of demand by the plaintiff of the defendants, before the commencement of the suit.

The court charged the jury, that the defendants had no right, in the absence of instructions to that effect, to send the money by any private conveyance or individual to the plaintiff, or to any one for him, and if the money was so sent, and did not come to hands of plaintiff, the defendants were liable.

The court also charged, that the relation of bailor and bailees, was not created by the foregoing facts; and that no demand was necessary to be made before bringing the suit.

The defendants' counsel asked the court to charge the jury, that if they believed from the evidence that the defendants procured the note above spoken of, to be discounted for and at the instance of the plaintiff, and received and held the proceeds to his use, the defendants then became the bailees of the plaintiff, and as such were entitled to demand before suit brought; which the court refused to give.

To the charges given, and to that refused, the defendants excepted; and judgment being given for the plaintiff, the defendants prosecute this writ, and assign for error, the charges given to the jury, and the refusal to charge as moved for.

Bliss, for plaintiff in error, contended, that the plaintiffs in error were the mere bailees of the defendant, and there not having been shown to be a conversion of the money, were entitled to a demand before suit. [He cited Story on Bailment, 2, 3, 41, 82, 139; 11 Wendell, 25; 6 N. H. 537.]

Salle, *contra*, maintained, that the plaintiffs in error had no right to transmit the money by private conveyance, but should have sent it by mail. That they were not the bailees of the defendant, but that in the case of a bailment, a demand is unnecessary, when there is conversion or loss from negligence. [He cited Story on Bailment, 82, § 107; Chitty on Bills, 157; 1 Cowper; 294; Peake's Ev. 186; 3 Starkie on Ev. 1089.]

ORMOND, J.—From the testimony, it appears that the plaintiffs in error became the agents of the defendant, to negotiate a note of the defendant in one of the banks of Mobile, and to receive the money arising therefrom to his use. It does not appear that any instructions were given to the plaintiffs in error, to transmit the money from Mobile to the residence of the defendant in Sumter county, and none can be implied from the nature of the transaction. If, therefore, the money has been lost in the attempt to transmit it to the defendant in error, although kindly meant, and done with the best intentions, the loss must fall on the plaintiffs in error; and the law would be the same if the public mail had been resorted to instead of a private conveyance. In either case it would be exposing the defendant to a risk to which he had not consented.

It was argued by the counsel for the plaintiffs in error, that as the money was to be kept by the bailees without recompence, they are liable for gross negligence only; but the question whether they were guilty of gross negligence or not, in the transmission of this money, does not arise in this case; as they had no authority to transmit, in any mode, either express or implied. The contract was a deposit, or naked bailment of money, to be kept for the bailor, without recompence. If the bailees had remained passive, and the money had been lost from their possession, their liability would have depended on the ascertainment of the fact, whether the loss was caused by gross negligence on their part. Such not being the fact, the argument has no application to this case.

It is certainly true, that a bailee becomes liable to an action without any previous demand, whenever he converts the thing bailed to his own use, or it is lost or destroyed by gross negligence on his part; and the reason of this is apparent. The law never requires a nugatory act to be done; it is therefore unnecessary to demand a return of that which has ceased to exist, or which the bailee has put it out of his power to return, by his own act. In either case he has put an end to the contract of bailment by his own act, and become a wrong-doer. Is that the case here? If it be conceded, as is perhaps the natural presumption, from the facts of this case, that the money is lost, is it not still in the power of the plaintiffs, if not to return the identical money they received, to discharge their obligation by the payment of the same sum, in money which must be of precisely equivalent value? It would be a most harsh exposition of this rule of law, to say, that the attempted kindness of the plaintiffs in error, constituted them wrong-doers, and subjected them not only to the payment of the money, but to the expence of a law suit also.

It must, however, be confessed, that the cases must be very rare in this country, where a resort is had to the legal tribunals, that it is not perfectly well understood, that a demand would be fruitless. Very slight circumstances, therefore, would be sufficient to authorize the jury to infer a demand. Such an inference might have been drawn in this case, if it appeared in evidence that the plaintiffs in error denied their responsibility, or if they were apprized of the loss, and refused to pay.

Let the judgment be reversed, and the cause remanded.

CLARKE v. WEST, ET AL.

1. Although a statute allows an execution to be issued against the sureties upon an administration bond, upon the return of "no property" to one issued against the administrator upon a decree of the Orphans' court, yet it is erroneous for that Court to render a judgment against such sureties without suit. The execution does not conclude the parties, and they have the right to test the legal sufficiency of the bond, but the manner of so doing is not yet clearly settled.
2. When a judgment is rendered against sureties in a summary manner, as was formerly the case in this State, upon forthcoming bonds; or as was here irregularly rendered against the sureties on the administration bond, such a judgment is distinct and separate from, and cannot be connected with the previous judgment, by suing out a writ of error. When a writ of error is sued out in the names of the sureties, it only removes the judgment rendered against them.
3. The peculiar jurisdiction of the judge of the county or orphans' court, over the settlement of an insolvent estate, is dependant upon the administrator's report of its insolvency, and cannot be sustained without it. Nor can such a report be inferred or presumed from any recitals made by the court in its orders upon the subject.
4. The consequence of a report of insolvency, is to make the administrator of the estate the *actor* in the proceedings: the effect of it is to discharge him from the suits of the creditors who are then entitled to have the assets divided amongst them. The administrator is therefore bound to take notice of all the subsequent proceedings by the court in the settlement of the estate, and no notice to him of the time of settlement is necessary. Creditors are properly notified by publication in some newspaper for forty days, and the place is the court-house where the settlement is made by the judge, and need not be stated in the notice.
5. On the final settlement of an insolvent estate, it is the province of the judge to determine for what the administrator is chargeable, and if an improper charge is made, or he is held to account for assets not connected with the administration, or reduced into money, the question must be raised by an exception, and can appear in no other manner.
6. The sureties upon the general administration bond, are liable for the proceeds of lands sold by the administrator, although before he is allowed to receive such proceeds, he is required by statute to execute a special bond, conditioned for the faithful payment and application of the money. The last bond is considered merely as an additional security.
7. When a judgment is rendered against an administrator, upon a final settlement of an estate, reported insolvent, in favor of several creditors, all of them must be made parties to the writ of error sued out by the administrator, to revise the final decree.

WRIT of Error to the Circuit Court of Butler county.

This was the final settlement of the estate of Henry West, deceased; and for the proper understanding of all the questions raised, an abstract of the entire record, is necessary.

Administration was granted on the estate of Henry West, deceased, by the county court of Butler county, on the 21st of August, 1837, to Margaret E. West, one of the defendants; and the others are her sureties on the administration bond.

On the 16th March, 1838, (in the record it is stated 1837, but the entire transcript shows the clerical error,) an order was made, "that the return of Margaret E. West, administratrix, &c. is sworn to, examined, approved of, and ordered to be recorded; declaring on her oath, that she believes the estate to be insolvent."

On the 22d of August, 1839, it appearing to the satisfaction of the court, that a sale of the land of Henry West, deceased, mentioned in the petition, is necessary to pay the debts of said deceased; and it also appearing that the said lands cannot be fairly, equally, and beneficially divided amongst his heirs at law. It is ordered, "that the said real estate of the said Henry West, deceased, viz: (here follows the description of two half quarter sections, and one quarter section of land in T. 7, R. 12, described as being in Butler county,) be sold at public auction at the court-house in Greenville."

The order then names three persons as commissioners, to make the sale, after giving a specified notice, on a credit of six months; and directs that the notes shall be made payable to the administratrix; and that the commissioners should return them, with a report of their proceedings, at the December term of said court.

The report of the insolvency of the estate, the petition for the sale of the real estate, the report of the commissioners relative to the sale, and the final order of the court thereon, if they have any existence, are not set out in the transcript.

On the 19th of October, 1840, this order was made: "Margaret West, administratrix, having heretofore made a report, that the estate is insolvent; it is therefore ordered that forty days notice be given by advertisement in the Alabama Journal, to be published weekly at Montgomery, that all persons having claims against the estate, file them with the clerk of this court, on or before the second Monday of December next; upon which day is

ordered that final settlement of said estate be made by the distribution of assets, &c." No proceedings seem to have been had under this order.

On the 2d of March, 1841, this order was made: "In the matter of the estate of Henry West, deceased. In this case, Margaret West, administratrix, having heretofore made a report that the estate is insolvent; it is therefore ordered, that notice be given by advertisement in the Cahaba Democrat, a newspaper, published in Cahaba, also in the Mobile Advertiser and Chronicle, published in Mobile, to be published once a week in each paper, for forty days; that all persons having claims against the said estate, shall file them with the clerk of this Court, on or before the second Monday in September next, upon which day it is ordered that final settlement of said estate be made by final distribution of assets, &c. It is also ordered in this case, that Margaret West, the administratrix, be required to come forward and make final settlement of said estate on the second Monday of September next, and that she have notice of this order, by publication for three weeks in the Alabama Journal, a newspaper published in Montgomery."

On the 13th September, 1841, the final settlement was made, and is contained in the following decree: "This being the day appointed for the final settlement of the estate of Henry West, deceased, which estate was reported insolvent by Margaret West the administratrix. On examining the returns made by the administratrix, it is found that assets to the amount of $8,589 08-100 including interest, have come into the hands of the administratrix; and that the claims on file, and filed and presented against said estate, including interest, this day, amounts to 6565 76-100 dollars; whereby it appears that said estate is not insolvent, but fully able to pay all the claims here presented; and it appearing to the court that this settlement has been duly and legally advertised, as the law requires; and the said Margaret E. West, administratrix of said estate, being solemnly called to come into court, came not, but wholly made default. It is therefore ordered and decreed by the Court, that the following creditors, whose notes, accounts and claims, have been acted on, allowed and passed, have and recover of and from the said Margaret West, administratrix as aforesaid, the several amounts opposite their names, respectively, viz: (Here follows a judgment in favor of each cre-

ditor for the sum allowed him, and amongst the names is that of the plaintiff in error, whose judgment is for 121 33-100 dollars.) And that execution in favor of each of the above named persons against the said administratrix, for the several amounts to them decreed; returnable to this Court at the next November term. And it is further ordered and decreed that all claims against said estate, which were not this day presented for the action of the Court be hence barred: That the account current made up, approved and allowed this day, on this settlement, be recorded; the vouchers or claims which were presented, acted on, and allowed, be filed, and that the assets remaining in the hands of the administratrix, after paying the above judgments or decrees, remain in said administratrix' hands, subject to a division amongst the heirs of said estate, on their application."

On the 15th November, 1841, the last order in the cause was made, and is in these terms: "Ordered, that inasmuch as on the 13th day of September last, there was a decree rendered up against Margaret E. West, administratrix on the estate of Henry West, deceased, to the amount of $6,565 76-100; which appeared to the satisfaction of the court, to be remaining due, and unpaid to the creditors of said eslate, and executions having [issued] from the clerk of the court of this office, in favor of each creditor, for the amount which appeared to be due said creditors against said Margaret E. West, administratrix, &c., made returnable to this court on the third Monday in November then next; and all of the said executions having been returned to this court, with the following endorsement thereon, to wit: 'no property found in my county belonging to the defendant in execution, November 9, 1841—P. B. Waters, sheriff Butler county.' It is therefore ordered and decreed by the court, that the following creditors, viz:—(here they are severally named as in the last entry) whose accounts, notes and claims have been acted on, allowed and passed, have, and recover of, and from the said Margaret West, administratrix as aforesaid, and William Wallace, G. W. Shipp and Jeremiah Watts, her securities on her administration bond, the several amounts opposite their names respectively, to wit: (here the names of the several creditors, with the amounts recovered by them, severally, are stated, amongst which is the name of the plaintiff, who has judgment for $121 30-100,) and that executions issue."

On this judgment the defendants sued out a writ of error to the

Circuit Court, and there assigned the following grounds for its reversal.

1. Because there is no report of the insolvency of the estate.

2. The record does not show the estate was insolvent, there being no judgment of the County Court upon the insolvency.

3. All the proceedings under the report of insolvency were discontinued by operation of law.

4. There is no report of the sales of the land by commissioners; no obligation given for the purchase money to the administratrix; no bond given by her to apply the proceeds of the sales as is required by law.

5. No notice was given to, or had by the administratrix, of the account allowed on the final settlement, and no resistance offered to the claims presented.

6. Judgment is rendered against the administratrix.

7. Judgment was rendered against the plaintiffs in error, who are securities of the administratrix.

8. No notice was given to any of the plaintiffs in error.

9. Judgment was rendered against the sureties on the administration bond, for the amount of the land sales.

10. It is not shown that the administratrix had reduced the claims to money, nor the assets at the time of the decree.

11. No notice was given to, or had by the heirs at law.

The Circuit Court reversed the decree of the County Court, and remanded the cause. The plaintiff prosecutes his writ of error to reverse this judgment of reversal, and assigns,

1. That the writ of error should have been dismissed.

2. That the judgment should have been affirmed.

Cook, in support of the decision of the Circuit Court, argued that the proceedings in the County Court were irregular,

1st. Because no notice was given to the administratrix, nor was she present at the time of settlement. It is true that notice is not provided for by the statute, but it results from the nature of all judicial proceedings; the representative of the estate is the only one to contest the demands against it, and unless she was present the whole matter is a mere inquisition by the judge. Notice is necessary in all judicial proceedings. [Baylor v. McGregor, 1 S. & P. 158.]

2d. The record does not show any judgment of insolvency

rendered by the court, consequently it had no jurisdiction over the estate as an insolvent estate; neither does it appear what report was made by the administratrix. It may be, and most probably was, that she reported the *personal* estate as insufficient, and prayed a sale of the land. This idea is strengthened by the recitals in the order of the 22d August, 1839,—at all events, this record is too inconclusive to give a voluntary jurisdiction to the court.

3. If the jurisdiction assumed, did not arise out of the insolvency, it is clear that the whole settlement is irregular. [Porter v. Creagh, 4 Porter 332; Horn v. Grayson, 7 Porter, 270; Humphreys v. Morrow, 9 Porter, 283; 4 Mass. 620; 12 ib. 570; 17 ib. 380, 86; 15 ib. 323; Digest, 151, 152.]

4th. There is no pretence afforded by the record to charge the administratrix with the proceeds of the lands; it does not even appear that they were sold; besides, without an order confirming the sale, no title would pass to the purchaser; and if the money was improperly received by the administratrix, it would not be assets of the estate, but would be money received to the use of the purchaser. [Lightfoot v. Lewis, 1 Ala. Rep. N. S. 475.]

5th. Conceding that all the previous proceedings are free from error, the last judgment against the sureties is not warranted by law. [Digest 253, § 40.] It is true, execution may issue on the bond, after a return of no property, against the administratrix—the issuance of an execution will not preclude the parties from contesting their liability on the bond. Here, however, a formal judgment is rendered, either upon the bond, or without any foundation whatever. If it is a judgment on the bond, then it estops all further inquiry into its merits, for no *supersedeas* would lie; the execution being regular and in accordance with the judgment, though it may not be warranted by the bond. This is a sufficient reason why the judgment should be avoided, if on the bond; and if not, there is nothing to support it.

6. The sureties however, are not liable to the judgment to its full extent, because when the land was sold, the administratrix must have given a bond to account for the proceeds. The general administration bond does not contemplate a sale of lands, and although its terms would cover the case, the subsequent legislation shows that the general sureties for the administration are not liable. [Digest, 177, § 3, 181, § 20.]

J. B. CLARK, *contra*—insisted,

1st. That the writ of error was irregular; it should have been sued out against all the creditors, as by a reversal of the judgment as to one, the unity of the proceedings will be destroyed. [Merrell v. Jones, 2 Ala. Rep. 192.]

2d. It is not essential there should be a judgment of insolvency by the County Court. If the administratrix has so represented the estate, she cannot complain, and the recitals in the decrees, are evidence of such a representation.

3. No mode of bringing an administrator before the court is prescribed, and therefore the court is authorised to give notice in such manner as it might direct, if notice is at all necessary. But whenever an estate is represented insolvent, the administrator is before the court, by his report, and is bound to take notice of all the proceedings consequent upon his report; by it he discharges himself from the common law actions, and it will not do to assert that the creditor is bound to pursue him.

4th. The jurisdiction arises out of the insolvency, and this is stated in both decrees ordering the final settlement. It is not material that the estate proves to be solvent, contrary to the belief of the administratrix, because the jurisdiction attaches on the representation, and cannot be subsequently divested.

5th. The court having jurisdiction to distribute the assets, must enquire what these assets are, and if the administratrix received the notes or money, for which the land was sold, she cannot be permitted to complain of her own irregularity. The court by its decree ascertains that she has received assets, and no exception is taken. In this view, the case is supported by the decision of Horn v. Grayson, [7 Porter, 270.]

6th. The decree against the sureties on the return of the execution against the administratrix, is only an award of execution, or rather is nothing more than the statute directs to be pursued; and the judgment ought not to be reversed for a more formal error. This judgment estops nothing, and the sureties have the same remedy by *supersedeas*, as they would have if the execution had issued on the bond without any order.

7th. The sureties for the administration are liable according to the terms of their bond, and full effect can be given to the subsequent act, which requires the administrator to give a bond, when he recieves the proceeds of land sold. [Digest, 189, § 16.] The

second bond is an additional security and may enure to the benefit of the sureties of the first; but it is clear that the statute which authorises execution against the sureties, contemplates the general sureties for the administration. [Digest, 252, § 37; 253, § 40.]

GOLDTHWAITE, J.—1. In the examination of this case, we shall depart in some degree from the order of the argument, and first consider that assignment of error which questions the correctness of the judgment rendered against the sureties.

If this is to be considered as the mere award of an execution, having no effect on the rights of the sureties, and not as a judgment, then the writ of error was improperly sued out, and should be dismissed. But we think it must be considered as a judgment, because it has all the distinctive features of one; the facts are set out by which it was induced, and the consideration of the court upon those facts is, that certain persons therein named, recover of certain other persons several sums of money. If such a judgment was rendered in any other State, and sought to be enforced in the courts here, we should have no authority to look into the statutes of that State to ascertain whether the judgment was warranted by law. The judgment would conclude such an examination. Considering it with reference to our own course of practice we could not supersede an execution issued upon it, if conformable to its terms, for in such a case, it is evident the execution would be perfectly regular. The statute which is supposed to warrant this judgment, is in these terms: "whenever any execution shall have issued on any decree made by the Orphans' Court, on final settlement of the accounts of executors, administrators or guardians, and is returned by the sheriff, 'no property found' generally, or as to a part thereof, execution may, and shall forthwith issue against the securities of the executor or administrator, or guardian. [Digest, 253, § 40.] Nothing is said of any power to render a judgment, and the right of any surety to question his liability upon the bond, exists as fully as if no execution was authorised. The mode of contesting this liability, is not yet clearly settled by the decisions of this court; as hitherto, no case has been presented involving the precise question. The statute does not pretend to conclude the rights of the sureties when allowing an execution to run against them without a suit at law. It merely imposes upon them a necessity to avoid the effect of the execution by showing

that the bond is irregular, or not binding on them. The County Court, however, has undertaken to decide these questions by its judgment, and having no authority to do so in this summary manner, the judgment is erroneous, and that of the Circuit Court reversing it, was proper.

2. If this judgment against the administratrix and her sureties had been authorized by the statute, in a manner similar to that which once prevailed in relation to forth-coming bonds, it would not be competent for the sureties to review any supposed error in the decree against the administratrix. The judgments in such cases are distinct and separate; and cannot be connected in the same writ of error. This principle is in effect, the same as that decided in Livingston v. The steam-boat Tallapoosa; [9 Porter, 111,] Witherspoon v. Wallis, [2 Ala. Rep. 667.] The writ of error only attaches to the last judgment; and what we have already said, disposes of all the case that is properly before us; but as the suit, without some final decision upon its merits, most probably would return upon us by a writ of error, sued out by the administratrix, we deem it proper to examine the entire case, as it appears in the transcript.

3. It is urged that no foundation is shown to support the peculiar jurisdiction exercised; and it is supposed it can only arise when an estate has been adjudged, as well as reported insolvent.

Our statutes, although they leave no doubt with respect to the mode, by which an insolvent estate shall be closed, are not clear as to the manner of ascertaining the fact of insolvency. In our present compilation of statutes, the 28th and 29th sections of the act of 1806, [Laws of Ala. 327] seem to have been omitted.—These sections, it is true, indicate what the report of the administrator shall contain; but their directions seem necessary, only with a view to the sale of the real estate, and if they were now in force, would not relieve the case from its difficulty, which seems to be one inherent to the subject matter, arising out of the uncertainty of the investigation. The certainty that an estate is insolvent, can only be made apparent when it is finally closed. An administration would be a most hazardous business in many cases, if the administrator could not protect himself from judgments, when the assets were insufficient to pay the debts already ascertained. In most instances, the plea of *plene administravit* could not be interposed, because of the impracticability of reduc-

ing the assets to money, inasmuch as our statutes direct a sale on credit; and this, after the sale, involves a considerable period of time in the collection of the debts thus created. It was in view of these matters, that this court [in Woods v. McCann & Witherspoon, 3 Ala. Rep. 61,] held it to be the duty of an administrator to represent the estate insolvent, whenever he has reason to believe the personal estate is insufficient to pay all the debts; and that such representation would abate all suits then pending against him. The effect then, of the report of insolvency, is to divest the courts of law of jurisdiction of suits against the administrator; under the statute, a peculiar jurisdiction is conferred on the judge of the county court, and is divided into two branches: first, to distribute the estate rateably between all the creditors; and second to decree a sale of such portion of the realty of the decedent, as will be sufficient to make up the deficiency of personal assets. [Digest, 151, § 2.]

Our business now is with the first branch of this jurisdiction. With this it seems the heir has nothing to do, as he has no interest whatever in the estate, until all the debts are discharged. It is true that the sections of the act just referred to, give the heir the right to contest the insolvency; and so also, does the subsequent act of 1822; [Digest, 180, § 16] but this right does not arise unless it is necessary, and an attempt is made by the administrator to obtain a decree for the sale of lands. Whatever is a matter of doubt upon this subject, under the act of 1806, is removed by that of 1821, [Digest, 154, § 7,] which provides, "When the estate of any testator or intestate shall be reported insolvent, it shall be the duty of the judge of the county court to audit and determine on the accounts relating thereto, according to the regulations prescribed for commissioners in such cases." From these statutes we infer that the peculiar jurisdiction with respect to an insolvent estate, rests entirely upon the report of the administrator, disclosing the insolvency. It is not necessary to do more than notice, the distinction between this and the cases of Wyman v. Campbell, [6 Porter, 219,] and Couch v. Campbell, [ib. 262.] Here the question arises on the decree itself, which in those cases was sought to be *collaterally* impeached.

The report of insolvency does not appear in the record, and without it all the proceedings of the county court, treating this as an insolvent estate, are irregular, and subject to be reversed on a

proper writ of error. The recitals of the report, in the various orders, cannot control this defect (if it is thus defective, in point of fact,) because the act of the court cannot create its own jurisdiction, which, as already shewn, arises only out of the act of the administrator. The report is the only evidence of what it contains, and cannot be ascertained by the consideration given to it by the court.

4. It is next insisted, that the subsequent proceedings in respect to the settlement of the estate were erroneous, because the administratrix had no legal notice of the time and place of settlement. Waiving the consideration of the minor question, as to the manner of giving the notice, we are of opinion she was entitled to none; or rather, that she is to be charged with notice of all proceedings subsequent to her report. The consequence of a report of insolvency, is to make the administrator an actor in the proceedings; the effect of it is to discharge him from the suits of the creditors; and when it is made they are entitled to have the assets divided amongst them. The action of the court is invoked by the administrator, and he is bound to take notice of all subsequent proceedings, until the closing of the estate by the final decree of settlement and distribution. Standing in this attitude to the proceedings, it is evident the administratrix cannot object that the creditors have had no sufficient notice, or of any other irregularities affecting them. In this view, the order of the court, on the 2d March, 1841, seems perfectly regular, so far as they are connected with it. The creditors are notified to file their claims in the manner which the law allows; the day of the final hearing is named, and the place necessarily is the court-house of the county, as the judge of the court himself determines upon the claims. It is only when commissioners are appointed that a different place is allowed (if it even then is) than the court-house.

5. It is said there is no pretence afforded by the record, to charge the administratrix with the proceeds of the sales of the land, and that it does not appear that the assets were reduced to money.

It is evident that there can be no distribution of the assets between the creditors until the amount of those assets are ascertained. From this results the necessity, that the judge of the county court shall determine for what the administratrix is chargeable. If an improper charge is made, or the administrator is held to

account for assets not connected with the administration, or reduced into money, the question must be raised by an exception, and can, indeed, appear in no other manner. [Horn v. Grayson, 7 Porter, 270; Douthitt v. Douthitt, 1 Ala. Rep. N. S. 594.]

We may remark also, that it may have appeared to the court, with respect to the notes given for the sales of the land, that the administratrix had received the same under the order of the court, as required by statute. (Digest, 181, § 20.)

The regularity of these proceedings is a matter between the heir at law and the administrator; and the record of the order of sale is not so immediately connected with the administratrix as to require that it should be insisted on in the transcript. Certain it is, that the administratrix could assign no error upon it in a contest with the creditors.

If no final decree was made by the court, confirming the sale of the lands, the title is not divested from the heirs, supposing the proceedings for the sale to have been under the act of 1822,—[Lightfoot v. Lewis, 1 Ala. Rep. N. S., 475,] and it may admit of doubt, if the administratrix received the money on the notes, without such final decree, whether it would be assets of the estate. But this is a question which we decline to give any opinion upon, as it is not sufficiently presented for adjudication.

6. The only matter not yet examined, is that which relates to the liability of the securities for the proceeds of the land sold or supposed to be sold under the order of the Court.

It may be remarked that it does not appear whether any additional bond was given by the administratrix when she received the proceeds of this sale; in such a case, if there was no remedy on the administration bond, there would be no security at all; but we think a brief examination of the several statutes, will be satisfactory to show that the general administration bond covers, and is intended to cover, all the duties of an administrator. By the act of 1821, [Digest, 177, § 3,] the condition provided for the bond is, that the administrator shall well and truly perform all the duties which are, or may by law be required of him as administrator. It is certain that the chief duty of an administrator is to account faithfully for all the assets which came to his hands; and therefore the failure to pay out these assets, is a breach of the condition. But it is said that other statutes contemplate that other bonds shall be given when a sale of real estate is decreed; and

that is a duty which the sureties do not stipulate for, inasmuch as it is provided for by other and express enactments. Thus the act of 1806, [Digest, 181, § 22,] directs that every executor, &c. empowered by the orphans' court, &c., to sell lands, &c., of any testator or intestate, &c., shall, before he obtains the order of sale from the office of the register or clerk, enter into bond with sufficient securities, to the chief justice of the orphans' court of the proper county, that he will observe the rules and directions of law, for the sale of real estate by executors, &c., and that he will well and truly account for the proceeds of such sale, and that the same shall be disposed of agreeably to law. And the act of 1822 expressly prohibits the administrator from receiving the bonds or money returned by the commissioners, until he shall enter into bond and security, conditioned for the faithful payment and application of the money, arising from such sale, according to the final decree. [Dig. 181, § 20.] Although this matter is not free from doubt, we think it must be considered that the legislature by these different provisions intended merely to provide additional securities; and did not intend to limit the liability of the sureties on the administration bond, merely to the personal assets. This conclusion is strengthened by the circumstance that no reference is made to the bond to be given for the sale of the real estate, by the statute which authorizes an execution against the sureties.—[Digest, 253, § 40.]

7. If the administratrix in this case had sought to reverse the final decree, all the creditors in whose favor judgments were rendered, would have been necessary parties to the writ of error, under the influence of the decision in Merrell v. Jones; [2 Ala. Rep. 192] for in no other way could the unity of the proceedings be preserved; it being evident that the same course which would authorize a reversal as to one creditor, must avoid the judgment as to all, or so change its amount as to render it impracticable to render complete justice to all the parties.

Our conclusion as to the case, is sufficiently obvious, without a recapitulation. The judgment of the Circuit court is affirmed. The clerk of the court will so make his entry, as to refer to the last judgment rendered by the county court, upon the bond, and must omit the remanding of the case, as no further proceedings can be had in the county court, other than to issue execution according to the statute, unless the administratrix shall supersede the judgment against her.

WADE v. JUDGE.

1. An affidavit to hold to bail, which affirms that the defendant "has fraudulently conveyed, or is about fraudulently conveying his estate or effects," is defective under the act of 1839 "to abolish imprisonment for debt," because it is in the alternative, instead of alleging one distinct ground.
2. The statutes of 1807, '11, '21, '33 and '39 in respect to insolvent debtors, are parts of an entire system, and to be considered *in pari materia:* these several acts regard the schedule of the debtor rendered after arrest, when accepted by a court or judicial officer, as a transfer in law of the effects to which it refers, to the sheriff of the county in which they are found. But if the creditor fail to obtain judgment, or the debtor is otherwise legally discharged, the legal assignment is avoided and the property re-vests in the debtor.
3. *Quere*—does the acceptance of a schedule operate a transfer of the real and personal estate of the debtor which may be *extra territorium*.
4. Previous to discharging from imprisonment an insolvent debtor who has rendered a schedule of his effects, the court may direct that money, choses in action, or other property about his person or near at hand, shall be delivered up.
5. In a proceeding by *habeas corpus*, at the suit of one who has been arrested on civil process, with the view of obtaining his discharge, the State and not the plaintiff in the action, should be made the adverse party. An order made in such a proceeding is not a final judgment or sentence, which may be reviewed on error; but it seems the party aggrieved by it, may obtain justice by a *mandamus*, or other appropriate writ.

WRIT of Error to the Circuit Court of Lowndes.

The transcript of the record in this case is the proceedings had upon a writ of *habeas corpus*, sued out at the instance of the plaintiff in error. It appears that the plaintiff had been arrested under a writ of *capias ad respondendum*, issued at the suit of the defendant in error. The objections sought to be here raised are,

1st. To the sufficiency of the affidavit to hold to bail.

2d. The order made upon the schedule rendered by the petitioner in order to his discharge from custody.

The affidavit is not set out in *extenso*, but is thus recited in the order for bail made by the clerk issuing the writ: "The plaintiff having made oath that the defendant is indebted to him in the sum of six hundred and two 81-100 dollars, with interest from the

24th of June, 1841, and that he has fraudulently conveyed, or is about fraudulently conveying his estate or effects."

The schedule of the petitioner described property in his possession and also effects in the State of Mississippi; it was thereupon ordered that he be discharged from custody upon surrendering to the sheriff the evidences of debt, money, and a watch in his possession.

The court made no order as to the notes and effects in Mississippi, and the plaintiff in the action released all claim to the trunk and wearing apparel of the petitioner.

Elmore, for the plaintiff in error.
T. J. Judge, for the defendant.

COLLIER, C. J.—The laws which impose restraint upon personal liberty have never been greatly extended by construction, but it has been considered necessary that whatever they enjoin upon the creditor, in order to warrant the arrest of his debtor, must have been performed, or the latter will be entitled to his discharge. Thus it has been holden that the affidavit must be as positive, as from the nature of the case, it can be, to show the amount and character of the indebtedness. And it has been argued that although the affidavit in the present case may be sufficiently explicit upon that point, yet it is defective in declaring that one of two facts is true, without specifying which.

The second section of the act of 1839, "to abolish imprisonment for debt" after providing that a creditor who wishes to arrest his debtor by legal process, shall make oath of the amount of the indebtedness, requires that he shall state farther, that he "is about to abscond, or such debtor has fraudulently conveyed, or is about fraudulently conveying his estate or effects, or such person has money liable to satisfy his debts, which he fraudulently withholds." By the third section, it is enacted, "that when a plaintiff, or his agent, shall take either of the alternative oaths required in the last section, and the same shall not be controverted by the oath of the debtor, then such debtor may discharge himself from said arrest by rendering a schedule of all the estate, effects, choses in action, and moneys, which he has in possession, or is entitled to, and taking the subjoined oath, &c." The several grounds upon which the arrest of the debtor is authorised by the second section

are to be regarded as distinct from each other, and if the creditor were to state them all in his affidavit, connected as they are, in the act, with the conjunction "or," the affidavit would be defective for uncertainty as to the particular ground embraced, or perhaps for failing to affirm the truth of either. This conclusion is strengthened by the third section, which supposes that the creditor is to swear to the truth of but one of the alternatives. And an affidavit like that recited in the order for bail, which sets out two of the grounds disjunctively, is quite as objectionable as if it contained all.

In respect to the order made upon the schedule rendered, it may be remarked that the act of 1839, does not prescribe the manner in which the debtor's estate shall be disposed of—in fact it is exceedingly defective in its details, considering the important change it proposed in the legislation of the State. For the purpose of ascertaining what the law is upon this point, we must refer to pre-existing statutes. The act of 1807, "concerning executions and for the relief of insolvent debtors" provides that "all the estate which shall be contained in such schedule, and any other estate which may be discovered to belong to the prisoner, or such interest therein as such prisoner hath and may lawfully part withal, shall be vested in the sheriff of the county, wherein such lands, tenements, goods or chattels shall lie, or be found, and such sheriff is hereby authorised, empowered and required, within sixty days after the taking of the said oath, ten days previous notice of the time and place of sale being given, to sell and convey the same to any person or persons whatsoever, for the best price that can be got for the same, and the money arising from such sale shall be by such sheriff or officer paid to the creditor or creditors, at whose suit such prisoner or prisoners, shall be imprisoned." The schedule here referred to, was required to be rendered by one who desired to take the oath of insolvency, upon being taken in execution in a civil case. But the act of 1811, "regulating judicial proceedings in certain cases, and for other purposes" enacts "where any person may be in custody, upon original or mesne process, such person shall be entitled to the benefit of the provisions of the act entitled "an act concerning executions, and for the relief of insolvent debtots" in the same manner as is therein provided for persons charged in execution: *Provided nevertheless*, that no plaintiff in a suit against any person who

may have availed himself or herself of the provisions of the aforesaid act, and who shall not have obtained final judgment against such defendant taking the benefit of the aforesaid act, shall receive any part of the proceeds of the estate of such prisoner, in the distribution thereof, to the prejudice of any person who may have charged the same prisoner in custody upon execution."

The statute of 1821 is more general in its provisions than either of the preceding enactments, and points out the manner in which a person arrested under mesne or final process may be discharged, or a debtor may relieve himself from liability to arrest. By this act the debtor is required to "deliver in a schedule of his whole estate and make oath to the effect of that then required by law in relation to insolvent debtors, &c. and the property therein mentioned shall be disposed of in the manner directed by the existing laws, for the benefit of his or her creditors generally." And the statute of 1807, as modified by an act passed in January, 1833, provides, that after the debtor shall deliver in his schedule and take the oath in verification, and deliver up all evidences of debt in his possession, and orders for such as are not in his possession, he shall then be discharged. [Aik. Dig. 226,–7–8–9.]

These several enactments form parts of a system and are to be construed *in pari materia*. As the act of 1839, entitles the party taken in custody to a release therefrom upon exhibiting his schedule properly verified, without giving any directions as to the disposition of the debtors estate, we must refer to the previous statutes for information upon this point. These laws seem to regard the schedule when accepted by a court or judicial officer, as a transfer in law of the effects of the debtor to which it refers. Whether such would be its operation upon the estate real or personal, which may be *extra territorium*, or who will be regarded the legal assignee where the debtor takes the oath of insolvency without having been previously arrested, we will not determine. But the act of 1807, to which the subsequent statutes refer and thus far adopt, declares that the estate contained in the schedule shall be vested in the sheriff of the county in which it may be found; and this must be held to be the consequence resulting from the acceptance of a schedule made under the act of 1839. By this construction the statutes effect the purpose proposed by the legislature, the debtor is discharged by divesting himself of his

property, and the creditor obtains the benefit of it through the means of an agent in whom the law has vested it.

If the creditor should fail to obtain a judgment, or the debtor otherwise legally discharge himself from custody, the legal assignment would of course, be avoided, and the property re-vest in the debtor. But so long as the property remains in the sheriff or other officer, neither the debtor or any one else could rightfully interfere with it, and an intermeddling might subject him to a criminal prosecution; the terrors of which would perhaps afford an adequate protection to the rights of the assignee.

In respect to money, choses in action, or other property which may be in the debtors immediate possession, that is to say, about his person or near at hand, it would be competent for the court to direct that they should be delivered up previous to the discharge from imprisonment becoming operative. And as to the other property, we have seen, the debtor, or any one else would retain or use it at their peril.

It is needless to make a more particular application of these principles to the case at bar, as the cause must be repudiated for the reasons which we will now state. *First*, The writ of *habeas corpus* is a means provided by the law, by which one unlawfully held in custody may be released; and if the detention is in virtue of, or under the pretence of civil process, the plaintiff in the action is not a party to the proceeding, but as the petitioner affirms that he is wrongfully deprived of his liberty, the State in legal presumption, is concerned in having justice done. The writ of error is then defective in having made the plaintiff in the action a defendant. *Second*, Even conceding that proper parties have been made, and still the case cannot be entertained. There is no such final judgment as will sustain a writ of error, but it must be regarded as an order made pending the action. If either party is prejudiced by such an order, justice may be obtained by asking this court for a *mandamus*, or other appropriate writ.

Let the writ of error be dismissed.

MOORE AND MOORE v. PENN, use of the Huntsville Branch Bank.

1. When the Bank has not the legal title in a note, it may sue in the name of the person who has the legal title to its use.
2. Evidence that the Bank had no interest in a note, is irrelevant, unless a foundation is laid for its introduction—as for example, an offer to prove an off-set against a third person, as the true owner of the note.

Error to the Circuit Court of Madison.

Moore, for plaintiff in error.
McClung, *contra.*

ORMOND, J.—This was a suit brought by the defendant in error, as assignee of Gabriel Moore, for the use of the Branch Bank at Huntsville. It is now insisted that a suit cannot be thus instituted for the benefit of the Bank; but we are very clear that such is not the law. The Bank can only sue in its own name, where it has the legal title; and like any other person where it has only the equitable interest, must sue in the name of the person holding the legal title.

It was also offered by the defendant to prove in the court below, that the Bank had no interest in the note; which the Court excluded as irrelevant.

It does not appear from the bill of exceptions that this evidence was offered as the foundation of any defence which the defendant proposed to make, and was therefore properly excluded. It would doubtless have been proper testimony, if an off-set against the nominal plaintiff, or payment to him, had been the defence which the defendant desired to make to the note, but the mere isolated fact that the Bank had no interest in the note, was a matter wholly unimportant to the defendant, and therefore properly excluded.

Let the judgment be affirmed.

ECKFORD v. WOOD, ET AL.

1. The master of a vessel has the right to retain the possession of goods liable to the payment of a general average, until it is paid, and if he parts with goods which he is thus authorised to retain, and afterwards pays their portion of the contribution, an implied assumpsit is raised that he shall be repaid by the owner.
2. A stipulation entered into by the consignees, in their own names, to pay the average on goods, is a personal obligation, which does not bind the owner; nor does it, without satisfaction, discharge him from liability for contribution.
3. The master of a vessel is authorised to contest a claim for salvage, and to liberate the vessel and cargo on stipulation as the agent of the owners of the cargo or of the vessel; the latter having the right to retain the cargo until the payment of freight. Sureties, in such a stipulation, are, in effect, sureties for the owners of the goods and vessel, they being primarily bound for the payment of the decree; and payment by the sureties is so much money paid for each contributor, as his proportion comes to.
4. After the payment of salvage by a surety in a stipulation bond, if the owner of goods claims and receives of the insurers the loss as ascertained by the decree, or directs payment to be made of the claim—either of these circumstances authorize the presumption of a satisfaction of all that has been done to effect the adjustment of salvage.
5. A charge that the owner of goods is bound in consequence of a stipulation entered into by consignees, in their own names, is erroneous, although the owner is bound by receiving the goods, inasmuch as the verdict may have turned on the charge.
6. When plaintiffs introduce a record showing payment under a decree made at a certain time, it is not competent for them to dispute the conclusiveness of the record as to the time.

WRIT of Error to the County Court of Mobile county.

This action of assumpsit was commenced by attachment, on the 18th of January, 1841, and the plaintiffs declare for money paid, &c: verdict and judgment for the plaintiffs.

At the trial a bill of exceptions was taken by the defendant, which discloses this state of facts.

The defendant was the owner of certain goods, valued at $6400, and shipped at Philadelphia, on board the schooner Thomas Ewing, bound for Mobile. On her voyage the vessel run aground at Mobile Point, but was gotten off and arrived at Mo-

bile. The vessel was consigned to the plaintiffs, and the goods of the defendant to McMorris & Knox.

On its arrival the schooner and cargo were libelled for salvage, and seized by the marshal of the United States; but released, upon the master's entering into a stipulation to perform the decree which might be rendered. The plaintiffs and one Latham Hull were the master's sureties in this stipulation.

The master required of the several consignees of the goods, before delivery, to sign a stipulation. This recited the accident, and admitted that thereby the schooner had been obliged to employ lighters, and to throw overboard a part of the cargo, whereby a general average had accrued. The subscribers to it then agreed to pay their respective proportions of the average as soon as adjusted. This stipulation was signed by many persons, and opposite their names is a sum stated, most probably intended to indicate the value of the goods consigned. Among the names subscribed is the firm of McMorris & Knox, for Wm. Eckford, and opposite their names is the figures $7,600. It was shown that the addition "for Wm. Eckford," was added after the stipulation had been signed a considerable time, and by McMorris & Knox, when they had ceased to be the agents of the defendant. It was also shown that of this 7600 dollars 1200 was for goods belonging to one Fernandez, also consigned to McMorris & Knox, but in which the defendant had no interest.

The plaintiffs refused to deliver the goods to the consignees until they should execute a bond, with condition to pay such proportion of salvage, costs and expenses as should accrue on said goods; and thereupon McMorris & Knox gave bond with securities provided by them, payable to Irelan the master of the vessel. This bond was accepted by the plaintiffs, and the goods thereupon delivered to McMorris & Knox, who forwarded those belonging to the defendant to him, and sold those belonging to Fernandez.

The plaintiffs also gave in evidence the statement or account of the average, made by a notary, stating the value of the vessel and cargo at 50,391 72-100 dollars, and the entire amount of salvage, costs and expenses at 11,351 08-100 dollars; and showing McMorris & Knox liable to pay on $7,600 as consigned to them, 1,711 99-100 dollars.

The plaintiffs also introduced a transcript of the decree of the

District Court of the United States, on the libel for salvage, showing that 20 per cent. on the value of the vessel and cargo, was allowed to the salvors. This decree is stated in the transcript, as being rendered on the 22d June, 1841, and a supplemental decree was had on the stipulation against Irelan the master and his sureties for 9,830 97-100 dollars, the sum decreed for salvage. This is stated in the transcript to have been rendered on the 22d June, 1841. This sum was paid by the plaintiffs to the marshal.

It was also shown that Eckford had received from his insurers compensation for the loss sustained, as well as his goods shiped to him by McMorris & Knox.

The defendant offered evidence to show that McMorris & Knox were indebted to him at the trial, in the sum of 3,000 dollars, but that the accounts between them when the stipulation was entered into, showed a nominal indebtedness of the defendant, caused by engagements for him by McMorris & Knox, which never were paid. Eckford had directed McMorris & Knox to pay the amount which the plaintiffs claimed, but they refused, on the ground that they were not in funds. It was also shown that McMorris & Knox had since become insolvent.

On this evidence, the defendant requested the Court to instruct the jury,

1st. That the transactions as proved, do not support this action.

2d. That if the goods were delivered to McMorris & Knox, on their giving their own bond with surety, the recovery must be on that bond, and cannot be against the owner.

3. That unless Wood or Irelan can show they had a right to replevy the goods, the plaintiffs cannot maintain this action.

4. That if the jury should believe the condition of the delivery of the goods was a bond payable to Irelan, then the plaintiffs can not recover.

5. That the plaintiffs cannot recover, unless they show that they gave notice to the defendant before suit, that they had paid money for his account.

6. That there can be no liability against the defendant on the first or average bond, under the proof.

7. That the record produced is conclusive proof of the time when the decree was rendered, and that the plaintiffs could not deny it, they having introduced the same in evidence.

8. That from the evidence shown, the plaintiffs had no right

to replevy the goods, and to charge the defendant thereby, unless requested so to do by him.

All which the Court refused to charge, and instructed the jury that if McMorris & Knox were the agents of the defendant, and the average bond was given at their request as such, the defendant would be thereby bound; that if they, as the agents of the defendant received the goods, and forwarded them, the defendant is bound; that if the plaintiffs, by reason of the delivery to McMorris & Knox, became liable, and paid the 20 per cent. salvage, the defendant is bound to refund; and that if the suit was instituted before the decree was rendered, then it cannot be sustained.

The defendant excepted to the refusal to give the charge requested, and to those given, and now opens the examination of the entire bill of exceptions, by his assignments of error.

STEWART, for the plaintiff in error.
DARGAN, *contra.*

GOLDTHWAITE, J.—Although this case is somewhat embarrassed by the quantity of evidence, and entangled by the number of charges requested, yet the rules which must govern it are few and exceedingly plain.

The claim of the plaintiffs to be reimbursed for the money paid for the defendant, arises from two distinct grounds; first, from the payment on account of the general average for the goods thrown overboard, and secondly for that made under the decree for salvage.

1. As to the general average, the rule of the civil law is that the master may sue and be sued for the adjustment of it, but by the common law, each shipper who receives his goods, is liable to an action at the suit of every one entitled to receive from him. [Abbott on Ship. 361.] The master also has the right to retain the goods until the adjustment is made, and the average paid; but it is said, a court of equity will not compel him to assert this right for the benefit of those entitled to contribution, [ib. 362.] If the master has the right to retain the goods until the average is adjusted and paid, as admitted by all the authorities, it follows that a payment to him must discharge the contributor from all the contributees, although the money may never reach their hands;

and this consequence goes far to establish the reasonableness of the rule of the civil law; but conceding the master cannot sue or be sued according to the common law, we cannot doubt that if the master, or the consignee, who is his agent, voluntarily parts with goods which he is authorised to retain, and afterwards pays the contribution for which he could have retained them, an implied *assumpsit* is raised, that he shall be repaid by the owner. In Simmons v. White, [2 B. & C. 805,] it is said "that the shipper of goods, tacitly, if not expressly, assents to general average as a known maratime usage; and by assenting to it, he must be understood to assent also to its adjustment, according to the usage and law of the place where the adjustment is to be made."

2. In this case, the stipulation of McMorris & Knox, certainly did not bind the defendant, because it did not purport to do so, nor was it executed by them as his agents. So neither can it have the effect to discharge him from liability, as there has been no satisfaction under it. The defendant is bound, by the payment made for his benefit, and a sufficient authority to make it, may be presumed from the reception of the goods without paying the contribution for which they were liable.

3. With respect to the claim growing out of the payment of the decree for salvage, it rests on principles slightly different.

There is no question, we think, that the master was authorised to contest the claim of the salvors, and to liberate the vessel and cargo, on the customary stipulation; and this, either as the agent of the owners of the cargo, or as the agent of the ship owners who were entitled to retain the cargo until the payment of freight. When then the plaintiffs became the master's sureties on the admiralty stipulation, they were, in effect, the sureties for the owners of the goods and vessel, released by this act of the master. As the goods were primarily liable for the payment of the decree, the payment made by the plaintiffs was so much money paid for each contributor as his proportion comes to.

4. Independent of these considerations, the evidence discloses two other grounds, either of which, in law, amounted to a satisfaction of all which the plaintiffs had done. It seems this defendant directed his agents to pay the claim, and also that compensation had been made to him by his insurers. Either of these circumstances would authorise the presumption of a satisfaction of the payment made by the plaintiffs.

The application of these principles will show a liability in the defendant, but there are errors in the charges given and refused, for which the judgment must be reversed.

4. The court charged, that if McMorris & Knox, were the agents of the defendant, and if they, as such, requested that the stipulation for the average should be taken, he would thereby be bound. This is erroneous, because, as agents they did not attempt to bind him, but only bound themselves personally. It is true, he was bound without such a stipulation, but for what we can know, the verdict may have been based on this charge. The sixth charge, which requested instructions that the defendant was not bound by this stipulation, ought to have been given, although there was enough independent of it.

6. It is probable, after all, that this action was premature, inasmuch as the record shows it was commenced in January, 1841, while the transcript offered in evidence states the decree in the admiralty proceedings, as having been had in June afterwards. The seventh charge requsted evidently relates to this condition of the proof, and certainly it was not competent for the plaintiffs to dispute the conclusiveness of their own evidence as to the time. The charge ought to have been given, and if the record is correct, it would probably have produced a different result.

Let the judgment be reversed and remanded.

MAGEE & MANSONY v. TOULMIN.

1. To sustain a judgment under the act of 1827, which gives to the sheriff a summary remedy by notice and motion, against the principal and his surety, in a bond of indemnity, the record should show that the obligors had sixty days previous notice that a judgment would be moved for against them; it is not enough that the judgment entry recites that they had notice for that length of time of the pendency of the suit against the sheriff.

Writ of Error to the Circuit Court of Mobile.

The judgment entry recites, that the defendant in error, while sheriff of Mobile, on the 4th of June, 1836, took from the plaintiffs and Philip McLoskey, a bond, in the penal sum of ten thousand dollars, indemnifying him against any action or actions that might be brought against him for levying three writs of attachment in favor of McLoskey, Hagan & Co. against one George Harrington, on certain goods and effects, as the property of the latter. *Further:* that suit was instituted against the defendant in error, by Lesesne & Edmundson, in the Circuit Court of Mobile county, for levying on and selling the goods and effects. It is also stated that the plaintiffs in error had sixty days notice of the pendency of the suit against the defendant before the trial. Then follows a judgment in favor of the defendant for thirty-six hundred and eighty-four 90-100 dollars, the amount of the judgment recovered against him by Lesesne & Edmundson.

Detached from the judgment, we find in the transcript, a bond of indemnity, similar to that above recited, also the following:

"T. L. Toulmin,
vs.
Philip McLoskey,
James Magee,
C. J. Mansony.

Motion for judgment in favor of Toulmin v. said McLoskey, Magee and Mansony, for the amount of a judgment rendered in favor of Lesesne & Edmundson v. Toulmin. The said McLoskey, Magee and Mansony, being the obligors of a bond to indemnify the said Toulmin.

CAMPBELL & CHANDLER, for motion."

This is a recital of the entire transcript, with the exception of the caption made by the clerk to indicate when the judgment was rendered.

STEWART, for the plaintiffs in error.
CAMPBELL, for the defendant.

COLLIER, C. J.—The act of 1827, "more effectually to protect sheriffs, coroners, and constables in the discharge of their duties," enacts that whenever any sheriff takes from a plaintiff in execution a bond indemnifying him for levying or selling property, the title to which is doubtful or disputed, if suit be instituted against him, or any of his deputies for making such levy or sale, he may give sixty days notice to the principal and sureties in the bond before the trial of such suit, that it is pending; and it shall be

their duty to defend the same, and a judgment for the same amount shall be rendered by the court on motion in favor of the sheriff against the principal and securities as may be obtained by the party suing the sheriff, which judgment may be rendered at any time after a recovery against the sheriff. [Aik. Dig. 169.]

It is not enough, under this statute, that it should appear, the principal and sureties were informed of the pendency of the suit against the sheriff, but it should appear that they had such notice of it, as would be likely to induce them to aid in its defence. To do this, they should be distinctly advised that a judgment would be moved for, against them, in the event of a recovery against the sheriff. In the present case, it is merely stated, that the principal and sureties had sixty days notice of the pendency of the suit. This recital in itself proves nothing, for it may be, that they were unconscious of having executed any bond, and consequently would not defend the suit, because they were not informed that it was intended to subject them to liability. [Atwood, et al. vs. Craig, 3 Stewart & Porter's Rep. 21.]

This view is decisive to show, that the facts recited in the judgment are insufficient to sustain it; it is therefore reversed and the cause remanded.

STALLSWORTH, ET AL. v. STALLSWORTH, EX'R.

1 When a general and particular intent are equally apparent on a will, and are so repugnant to each other that both cannot stand together, the latter must yield to the former; but it is the duty of the court, if possible, to put such a construction on the will as will give effect to every part of it.

2. When a testator, by his will, bequeathed slaves to his children, and afterwards directed a tract of land to be set apart for the use of his wife and the minor children, together with horses, stock, &c. for their exclusive use, until the youngest child, who may then be living, arrives at the age of twenty-one, and then that the real estate be sold and equally divided between the wife and such of the minors as might then be alive—held, that there was no incongruity between these clauses of the will, but that both could stand together—that the intention of the testator was that the minor heirs were entitled to their legacies

as soon as distribution could be made, and had the right to work their slaves on the land set apart in concert with their mother.

3. A judgment of the county court, refusing to appoint an individual guardian of the estate of certain minors, is not a bar to a suit in chancery, by the minors to recover their legacies.

ERROR to the Chancery Court at Conecuh.

This bill was filed by the plaintiff in error, as the next friend of three infant children of Nicholas Stallsworth; Eldridge, Benjamin and William.

The bill alleges, that the father of complainants, executed his will in such a manner as to pass lands, and died, leaving the defendant his executor, who has qualified as such, and taken upon himself the execution of the will; paid the debts, &c., and settled with the widow of the deceased, and several of the heirs. That complainants are entitled to certain slaves in the hands of the executor, as specific legatees under the will, and pray an account against the executor, and that he be decreed to deliver to them or their guardian the slaves belonging to them. The bill is filed by one Davidson, who intermarried with the widow of the deceased, as next friend of the minors.

The will is made an exhibit.

The 1st section is, I give to my son Eldridge G. Stallsworth, negro man Hall, and his wife Mary, and their children, six in number.

2. I give unto Benjamin F. Stallsworth, negro woman Lucy, Presley, and her five children, and young fellow Aaron and long head Jim.

3. I give unto my son Wm. A. Stallsworth, negro woman Molly, and her five children, together with Ransom, and his wife Louisa and child, with their increase.

8th section. It is my will and desire, that all my real estate lying on the east side of Beaver creek, on which I now reside, to be set aside for the use and benefit of my beloved wife, and our minor children, to wit: Eldridge G, Benjamin F, and James A, and my daughter Sarah, also my son William A, to be, and remain for their exclusive use, until the youngest child that may then be living, arrives at the age of twenty-one, then my will is, that the above real estate be sold, and equally divided between

my wife and our said minor children, or as many as may then be living.

12th sec. It is my will, that my beloved wife keep as many horses and mules, as may needed for the use of the plantation, and comfort of the family, together with as much stock of every kind, of which I am possessed, as the family may require; the balance of my stock of every kind, I wish to be sold, together with all surplus property, and be equally divided among my heirs.

13th. It is my will that the residue of my negroes, with the exception of old negro man Ned, be valued and put into eleven equal parts, regard being had to the families of negroes; if some lots should be more valuable than others, the difference to be made up in money, and that each of my children, that is to say, Calloway H, Nicholas, Mark P, Joseph J, James A, William A, Nancy Johnson, Mary Travis, and Sarah J, each draw one share for their own use and behoof. In case of my demise before the present crop is gathered, my will is, that every thing stand as it now is until the crop is housed. The money arising from the proceeds to go towards paying my debts, and if there be any left, to be divided equally between my wife and children above named.

The answer of the defendant, admits the will and the legacies as set out, and sets up an account and division of the other property, not specifically bequeathed, and shows the sum due to each, and the property of each; but insists on two distinct grounds of defence—that by the will, he was authorised to retain the property, until the complainants respectively became of age, and was not bound as executor, to pay over until then. Second, that application for distribution and payment of the legacies had been made to the Orphans' Court, and was determined against complainants. Third, that Davidson, their next friend, was not the guardian of their estate, but only of their persons.

The chancellor was of opinion that the matters in dispute had been substantially settled by a decree of the Orphans' Court, and could not be revised in chancery, but upon the ground of fraud, accident or mistake. He further decreed that the bill must be dismissed, because, by the proper construction of the will, the property bequeathed to the complainants, was to be retained in the possession of the executor, until the youngest child came of age.

From this decree, this writ of error is prosecuted.

The assignments of error, present for consideration the decree made by the chancellor.

DARGAN, for plaintiff in error.

BLOUNT, *contra*—cited 4 S. & P. 123; 5 Porter, 388; 6 ib. 77; 2 Ala. Rep. 529; 8 Cranch, 9; 9 Porter, 636; Ram. on Wills, ch. 12, 13.

ORMOND, J.—This bill is filed for the purpose of compelling the executor to deliver to the guardian of the infant complainants, certain slaves, bequeathed to them by the will of their father, and for an account. The entire controversy depends upon the true construction of the will.

The first five clauses of the will, consists, of specific bequests to five minor children, to each, by name, of certain slaves specifically described. The sixth and seventh, are also specific bequests of slaves to another child, and to his wife. The eighth clause, out of which this controversy arises, is to the following effect:

"It is my will and desire, that all my real estate, lying on the east side of Beaver creek, on which I now reside, be set aside for the use and benefit of my beloved wife, and our minor children, to wit: Eldridge G, Benjamin F, James A, my daughter Sarah J, and my son William A. Stallsworth, to be, and remain for their exclusive use, until the youngest child that may then be living, arrives at the age of twenty-one, then my will is, that the above real estate be sold, and equally divided between my wife Sarah, and our said minor children, or so many as may then be living."

The ninth clause conveys a tract of land to three adult children. The tenth and eleventh, are bequests to certain grand-children. The twelfth, which is also supposed material in this inquiry, is to the following import: "It is my will that my wife keep as many horses and mules, as may be needed for the use of the plantation, and comfort of the family, together with as much stock of every kind, of which I am possessed, as the family and plantation may require; the balance of my stock of every kind, I wish to be sold, together with the surplus property of every kind, and be equally divided among my heirs."

By the thirteenth clause, the testator desires that all the rest of his negroes be divided into eleven equal parts, each of his children to have one share "for their own proper use and behoof." All

the residue of his estate, to be equally divided among his wife and children; and lastly, he declares his son Nicholas, executor.

The general scheme of this will is quite apparent and very simple. The specific legacies of slaves, to the younger children, was doubtless to make them equal with the older children—then comes an equal division of all the slaves and other personal property among *all* the children, a particular estate in lands to three of the children, who are probably adults, and a tract of land which is left for the use and benefit of the wife and five minor children, until the youngest child comes of age, and then, to be equally divided between the wife and such of the children as may then be living.

This last clause, has created all the difficulty in this cause, as it is supposed, that taken in connection with the twelfth clause, it shows that the design of the testator was, that the wife and the minor children, should work the plantation, which was given for their use and benefit, under the care of the executor, who, it is further inferred, was for this purpose, in effect created testamentary guardian of the minors.

We cannot agree that this construction of the will is correct. The rule of interpretation invoked to sustain this view, is the rule, that when two intentions are apparent in a will, one *particular*, and the other *general*, if both cannot stand, the former must yield to the latter. The case of Robinson v. Robinson, [1 Burrows, 38] illustrates this rule and shows the reason on which it is founded; that was an issue out of chancery to ascertain the opinion of the Court of King's Bench, on a bequest in a will. The bequest was to L. H, for, and during the term of his natural life, and *no longer;* after his decease, to such son as he shall have lawfully begotten, and for default of *such issue*, then to W. R, and his heirs for ever.

In this case, it could not be doubted that the testator intended that L. H, should take an estate for *life only;* it was equally clear however, that he intended that the children of L. H, should take as heirs, because W. R, was not to take until failure of the heirs male of L. H. But this was inconsistent with the idea that L H, took an estate for life only. Therefore the court held "that the true construction of the will, was that L H, must by *necessary implication to effectuate* the *manifest* general intent, of the

testator, be construed to take an estate in *tail male*, notwithstanding the *express* estate devised to him for his *life and no longer*.

Before this rule of interpretation can be called into active exercise, it must be evident that there is both a particular and a general intent apparent on the will so repugnant to each other that they cannot co-exist together; for the most important of all the rules for the exposition of wills, and other instruments is, that effect, must, if possible be given to every part of it.

Now, in this will, it is clear, beyond doubt, that the slaves are given to the minor children, without condition or limitation as to the time when they are to be entitled to receive them. They are therefore entitled to them, immediately on the settlement of the estate; and that event had taken place before the filing of this bill. Is there any general intention equally clear, or more certain than these specific bequests, so repugnant to them that their plain literal meaning must be rejected, and the enjoyment of the legacies be postponed to a distant period, to carry such intention into effect.

The eighth clause of the will, which it is supposed renders this interpretation necessary, merely provides that a tract of land shall be set apart for the benefit of the wife, and the minor children, until the youngest child becomes of age. But this clause is by no means inconsistent with the former clauses of the will, giving to the minors a present right to the possession and enjoyment of their slaves.

It may doubtless fairly be presumed that the testator expected that his minor children, in concert with their mother, would work the plantation, set apart for their use, until they severally came of age, and that a sufficient inducement was held out to those who might have the superintendence of their interests, to adopt that course by providing the means of the profitable employment of their slaves, and by thus furnishing both the slaves and the minors a home. Whether the testator intended that this employment of the slaves of the minors, should be obligatory on the minors or their guardian, it is not necessary now to determine.

It is not a fair interpretation of the will, that to carry this intention into effect, the executor was appointed testamentary guardian of the minors. First, because if such had been the intention of the testator, it would in all probability have been so expressed. The attention of the testator was drawn to the subject, as he

doubtless, (as has already been stated) expected his minor children to live with their mother on the plantation, set apart for their use, and that the plantation should be worked by the slaves of the mother and the minors; yet with this view of the subject present to his mind, he merely appoints the defendant in error, his executor, the duties of which are essentially distinct from that of guardian; it cannot therefore be assumed that he intended the executor should act in both capacities, unless such implication must be made, to give effect to the manifest general intent of the testator.

But secondly, such an interpretation is not necessary, because full effect can be given to the will without it. The guardian appointed by the Orphans' Court will certainly be as competent to give the proper direction to the labor of the slaves as a testamentary guardian would be, and will be as much bound to conform to the provisions of the will. We are therefore, clear in the opinion, that the executor was not appointed testamentary guardian of the minors, because he is not so nominated in the will, and such an interpretation is not necessary to carry its provisions into effect. Not being necessary to carry the will into effect, such a decision is to interpolate, and not to interpret the will. The reason of the rule, therefore, so strenuously relied on, fails in this case. The particular intent, as it is called, is clear, the supposed general intent less certain; and both—admitting both to exist and be equally certain, may well stand together.

The principle here decided, received the approbation of this court in the case of Capel's heirs v. McMillan, [8 Porter, 204] when the court held, that in order to give the property left to minors, any other than its accustomed destination, or to give the executor any other power over it beyond what his appointment of executor gave him; the intention of the testator for the exercise of such power must appear in the will by plain language, or from clear implication.

We are also of the opinion that the judgment of the county court, refusing to appoint the *prochein ami* of the minors in this case, guardian of the estate of the infants, is no bar to this proceeding. Without entering at this time, upon the question, how far the powers of the Orphans' court, and the court of chancery, are concurrent in these matters, or in what particular the powers of either are exclusive, a question somewhat discussed in the case

of Leavens v. Butler, [8 Porter, 380;] it is sufficient ta say, that the question here presented was not adjudicated by the Orphans' court.

The question before that court, was an application for the guardianship of the estates of the minors. This did not involve necessarily the construction of the will, which could only properly arise upon an application by the guardian for the legacy of the minors. The reason which may have influenced the court in refusing to appoint Davidson guardian of the estate of the minors, is entirely distinct from its judgment, which may have been correct, though the reason given for it, was incorrect. As the construction of the will was not necessarily involved in that application, that question would not have arisen in this court upon an appeal from that judgment, and cannot conclude the parties as to any matter not necessary to be determined by the Orphans' court upon that application.

Our conclusion therefore is, that by the will, the minor children took a present interest in the slaves and other personal property, with a right to the possession, by their guardian, so soon as the estate was in a condition for distribution. That the minor children have the right, by their guardian, to work their slaves on the plantation designated in the will, and to receive their relative proportion of the profits until they severally come of age, and that the executor is not, by the will, appointed testamentary guardian of the minors.

It results from this view, that the decree of the chancellor dismissing the bill, must be reversed; and the cause remanded for further proceedings.

KENNEDY v. McARTHUR.

1. A count charging the defendant with harboring and concealing a runaway slave, knowing him to be such, is substantially a count in trespass, and may be joined with a count for seizing and carrying away another slave.
2. In an action of trespass for harboring a slave per *quod servitium amisit*, it is not necessary to aver in the declaration that the defendant has been criminally prosecuted, as the offence is a misdemeanor only.

WRIT of Error to the Circuit Court of Wilcox county.

This action is trespass *vi et armis*, by McArthur against Kennedy. The declaration has three counts. The first, charges that the defendant with force and arms took and carried away a negro man slave, the property of the plaintiff, from his possession, and kept the same from his service for the space of two years; the second asserts that the defendant wickedly, maliciously, and with force and arms, seduced, procured, and forced the slave to run away from the service of the plaintiff; and the third alleges, that the slave had run away from the service of the plaintiff, and that the defendant, well knowing the fact, with force and arms did harbor out and conceal said slave from the plaintiff.

The defendant demurred to the declaration, and his demurrer being overruled, pleaded the general issue; upon which a verdict was rendered, and judgment given against him for the damages assessed.

It is now assigned for error, that the demurrer ought to have been sustained, because there is no allegation in either count that the defendant has been prosecuted criminally for harboring the slave; and because of a mis-joinder of counts, one being in case, and the others in trespass.

DEAR, for the plaintiff in error.
BETHEA, *contra.*

GOLDTHWAITE, J.—1. The misjoinder of counts complained of in this case, is said to arise from the fact that the two

first counts are in *trespass*, while the last is in *case;* but we think they all are entitled to be considered as charging forcible as well as unlawful acts. The count supposed to be in *case*, alleges that the slave had run away from the service of the plaintiff, and that the defendant harbored and concealed him, with a knowledge of the fact that he was so run away.

It is said the law implies force where a servant has been enticed away or debauched, though in fact she may have consented, the law considering such a person as incapable of consenting, and therefore in such a case *trespass* may be supported, though *case*, for the consequences of the wrong has, till of late, been the most usual form of declaration. [1 Chitty's Plead. 143.] It is difficult to conceive how the unlawful concealment of a runaway slave can be effective without some positive act of control over it, but nothing merely negative, can give the idea of harboring. This offence must be the result of some positive act, and is in every respect equivalent to enticing the slave in the first instance to quit the service of his owner; it is consequently a trespass in the technical sense of the term.

2. The other objection is, that neither count of the declaration contains any averment that the defendant has been prosecuted *criminaliter* for the act of harboring. In our opinion this is not an essential averment, as the offence charged was nothing more than a misdemeanor, punishable by fine and imprisonment at the time when committed.

Let the judgment be affirmed.

GOODWIN v. WOOD, use, &c.

1. The act of 1837 "More effectually to provide for discoveries in suits at common law," authorises a party to propose to his adversary such questions only, as he would be bound to answer upon a bill of discovery in a court of chancery: *It was consequently held*, that the defendant was not bound to answer interrogatories which called on him to state whether he had entered as credits on

the note in suit, all the money that had been paid thereon; but to make such interrogatories pertinent, it should appear either from the interrogatories or affidavit accompanying them, that other payments than those credited, had been made.

WRIT of Error to the County Court of Talladega.

This was action of *assumpsit*, brought by the defendant in error against the plaintiff, on a promissory note made by the latter, for the payment of five hundred dollars to Alexander Watson, and by the payee indorsed to the plaintiff in the action, who sued for the use of Andrew Wooley.

The questions arising upon the assignment of errors, are presented by a bill of exceptions. From the bill it appears, that the cause being called for trial, the plaintiff declared himself ready, but the defendant stated that he could not go to trial, until certain interrogatories propounded to the party for whose use the suit was brought, were answered. These interrogatories, with the affidavit attached, are as follows:

"John Wood, assignee of Alexander Watson, use of Andrew Wooley, v. Young Goodwin. } Assumpsit, on a note in the County Court of Talladega county, July term, 1842. Interrogatories to be propounded to Andrew Wooley, for whose use this suit is brought; the answers to which will be read in evidence on the trial of this cause.

"*Int.* 1. State whether you have entered all the payments on the note sued on, which have been made to you by the defendant.

"*Int.* 2. State all the payments that said defendant has made to you on said note, their amounts and dates; and the amount of money paid by defendant to you, which you have not entered on said note.

"Personally came before me, Alex. J. Cotten, clerk of the County court of Talladega county, Young Goodwin, defendant in the above cause, who makes oath that answers to the above interrogatories, will be material evidence on the trial of the cause above stated."

The court decided, that the interrogatories were pertinent, but required the defendant to state the precise amount of the several payments, and disclose what he expected to prove by Wooley, that the plaintiff might admit it, if he thought proper. This state-

ment, the defendant declined making; and thereupon he was ordered to go to trial.

RICE, for the plaintiff in error.—The court should not have coerced a trial until the questions proposed to Wooley were answered by him. The act of 1837 authorises one party to call upon another, at law, to discover facts material to make out his case or defence: this statute authorised the exhibition of the interrogatories proposed, and the refusal to compel answers is a fatal error. [See also, 9 Porter's Rep. 266; 3 Ala. Rep. N. S., 295.]

PECK & CLARK, for the defendant.—The interrogatories appear from their caption, and the date of the *jurat* of the affidavit, to have been filed at the trial term of the cause, and consequently are not within the time prescribed by the statute. Besides, the interrogatories are fishing in not stating that any payments were made to Wooley on the note; and not being such as a court of chancery would compel a party to answer, they do not come within the terms of the act.

COLLIER, C. J.—An act passed in 1837, "more effectually to provide for discoveries in suits at common law," enacts that where a party in a suit at law wishes a discovery from his adversary, he may file written interrogatories to such party, and call upon him to answer on oath or affirmation; and if it shall appear to the court by the oath of the party filing the interrogatories, or otherwise, that the answers to the same will be material evidence in the cause, that the interrogatories themselves are pertinent, and such as the adverse party would be bound to answer upon a bill of discovery in a court of chancery, the court shall allow them, and make an order requiring them to be answered in writing on oath or affirmation. The answers so made shall be evidence at the trial, in the same manner, and to the same purpose and extent, and upon the same condition in all respects as if they had been procured upon a bill in chancery for a discovery, but no further. If the interrogatories shall not be answered within sixty days after service of a copy, or be answered evasively, the Court may attach the party to whom they are addressed, and

compel him to answer in open Court, or it may continue the cause, and require more explicit answers, &c.

The object of this enactment was doubtless to expedite and cheapen the administration of justice, by authorising a discovery to be called for at law, where in order to obtain it, it was previously necessary to resort to equity. It does not allow a party to propose to his adversary any interrogatories except such as he "would be bound to answer upon a bill of discovery in a court of chancery," and the answers are only evidence in the same manner "as if they had been procured upon a bill in chancery." In the present case, the interrogatories do not affirm that the defendant has made any payments on the note in suit, but call on the beneficial plaintiff to state, whether he has entered them all on the note, the amount paid, and when. The objection to the indefiniteness of the interrogatories might be cured by the affidavit, (but that affords no aid,) by alleging that payments have been made which the evidence of the party is necessary to establish, it merely declares in general terms, that the answers would be material evidence on the trial. The interrogatories are in the nature of a fishing bill, when assimilated to a discovery in equity, and as answers are only compellable in those cases, in which that Court would have compelled a disclosure, the County Court might very well have refused to compel an answer in consequence of the generality of the interrogatories. Lucas v. The Bank of Darien, 2 Stew. Rep. 280, and the cases there cited, very satisfactorily show that a fishing bill is demurrable.

But if the interrogatories were regular, still as they were exhibited when the case was called for trial, or at the same term, the Court very properly refused a continuance, unless the defendant would make a precise statement of the facts, and what he expected would be the answers of Wooley.

Other reasons perhaps might be given to show, that the Judge of the County Court properly ruled the parties to trial; but those stated are decisive of the case; and the judgment is consequently affirmed.

HAMMETT v. SMITH.

1. An averment in a declaration in an action by an assignee against an assignor, that *execution* issued on the judgment from the proper office, and was returned by the sheriff to the *proper office*, endorsed "there is no goods, &c., of the defendant to be found in my county," is sufficient.
2. The assignor of a note is liable to the assignee for the costs of the suit prosecuted against the maker of the note.

ERROR to the County Court of Talladega.

This was an action by the defendant in error, against the plaintiff in error, as assignor of a note made by one Vardeman.

The declaration, after stating the making and endorsement of the note, proceeds to aver the institution of a suit against Vardeman, in Talladega County Court, the recovery of a judgment against him, for the amount of the debt, and nine dollars fifty-one cents costs. It then avers that an "execution" issued upon said judgment "from the proper office," against Vardeman, for "the damage and costs above stated," and that the sheriff of Talladega county returned the same to the "proper office," he having endorsed thereon "there is no goods or chattels, lands or tenements, of the defendant, to be found in my county," by means whereof the said defendant became liable to pay the said sums of money, &c.

To this declaration there was a demurrer, which was overruled and judgment for plaintiff.

The assignments of error are,

1. The court erred in overruling the demurrer to the declaration.

2. The judgment is for the amount of the note and interest, and the *costs* of the suit against Vardeman.

MOODY, for plaintiff in error.

ORMOND, J.—The first objection taken to the declaration is, that in describing the writ of *fieri facias* which issued on the judgment, it is called an "execution." We think this averment

sufficient, as the declaration states that it was directed to the sheriff, to be levied on the goods and chattels, lands, &c., of the defendant; it is evident that it was a writ of *fieri facias*.

Neither is the objection to the return of the sheriff well taken. It is true that the statute makes the return of "no property found" conclusive evidence of the insolvency of the maker of the note; but we think the averment in this case, that the sheriff returned that "there was no goods or chattels, lands or tenements of the defendant, to be found in his county," is precisely equivalent, and is that statement of facts, out of which, the language employed by the statute is concluded.

It is also objected that the declaration states, that the execution was issued from the "proper office" and returned to the "proper office," without stating what office. We think these words surplussage, and that the declaration would have been sufficient if it had stated merely that an execution had issued on this judgment directed, &c., and was returned by the sheriff, endorsed, &c., and the insertion of these words, certainly cannot prejudice.

The remaining question, whether the assignor is liable in an action against him by the assignee, for the costs of the action against the maker, has not been before raised in this court. The statute makes it the duty of the assignee to prosecute a suit against the maker of the assigned instrument, and this he must do, although the maker is notoriously insolvent, or he cannot recover of the assignor; it appears, therefore, proper, that he should reimburse the assignee, the costs which he must pay in the prosecution of an ineffectual suit, which is really for his benefit. This disposes of the objection that the judgment is for too large a sum, and it must therefore be affirmed.

ERWIN, ADM'R, ET. AL. v. FERGUSON, ET AL.

1. When a bill is filed to foreclose a mortgage made to two persons, to secure the payment to them, of a sum of money, due by bond, and one of them dies previous to the exhibition of the bill, the survivor is the only indispensable party to the bill, when no interest is disclosed in any other person in the mortgage debt; and it is not proper to join the executors of the deceased obligee as parties complainant.
2. But although the executors of the deceased obligee, are improperly joined as complainants in such a bill, the objection, to be available, must be taken by demurrer, and cannot be raised for the first time, at the hearing, or on error.
3. The heir, or devisee of a mortgagor, who dies the owner of the fee, is an indispensable party to a bill to foreclose; and the personal representative may be made a party, if the complainant choses to proceed for an account.
4. An allegation that the mortgagor died, leaving certain children surviving him, is equivalent to an allegation that they are his heirs at law.
5. When an executrix of a mortgagor, who has refused to qualify as such, is made a party defendant to a bill to foreclose, the objection, if available, is personal to herself, and can only be raised on demurrer.
6. When infants who are defendants to a suit in chancery, reside out of the State, it is essential that the proceedings against them should conform to the statute providing the manner by which absent defendants shall be brought before the court; and the record must also shew that their rights as infants have been scrutinized, and if necessary, protected.
7. In proceedings in chancery against absent defendants, it is unnecessary that any subpœna should issue, when the necessary proof of non-residence is made before the register; when infant defendants are non-residents, it is perhaps necessary, under the amended rules, that their ages and places of abode should also appear.
8. In all suits in chancery against non-resident defendants, it is necessary that the bond required to be given by the statute should be executed, otherwise the decree cannot be sustained, unless they have voluntarily submitted to the jurisdiction.
9. The power exercised by courts of equity, to appoint *guardians ad litem*, for infant defendants, is one to be exercised for their benefit, and therefore the appearance of an absent infant defendant by such a guardian, does not have the effect of a voluntary appearance, so as to obviate the necessity for the statute bond to be given by the complainant.

WRIT of Error to the Court of Chancery for the first District of the Southern Division.

This bill is to foreclose a mortgage executed in October, 1830, by Henry Hitchcock and Anne, his wife, upon certain lands and tenements in Mobile, to secure the payment of forty thousand dollars, due by bond, from Hitchcock to Jonathan Ogden and John Ferguson.

The bill states that Ogden, one of the obligees, departed this life previous to its exhibition, and his executors join with the survivor, Ferguson, as complainant in the suit without any specific allegations to show that any interest in the bond and mortgage was transferred to the deceased obligee in his life time, or that he was entitled to any separate interest therein.

It also states that Hitchcock died *testate*, appointing his wife, Anne, sole executrix, who has since refused to qualify as such, and that administration *cum testamento annexo*, has been granted to Isaac H. Erwin, who has taken upon himself the administration of the estate.

It also states that Hitchcock left four infant children, to wit:—Caroline, Andrew, Henry, and Ethan A, but does not set out their respective ages, nor places of residence; nor does it show by distinct and specific allegations, whether they are entitled to any interest in the lands in mortgage, either as heirs at law, or as devisees under the will.

It alleges that the other defendants claim some interest in the mortgaged lands, derived from Hitchcock, subsequent to the execution of the mortgage, but does not set out their respective places of residence. The prayer is, that an account may be taken of the principal and interest due on the bond, and if it is not paid, that the mortgaged estate may be sold.

Process of subpœna is asked for against all the defendants, but only issued against Erwin, McCoy, Johnson, the two Sandfords, Cleveland, Myers, the Insurance Company, and the Bank, upon all of whom it was served. The date of the subpœna is the 17th of April, 1841.

With respect to the other defendants, infants as well as adults, an affidavit was made before the register on the 10th of April, that they were non-residents of this State, but the places of their residence is not shown. Upon this affidavit an order was made, at rules, for publication, requiring the non-resident defendants to appear, plead, answer or demur to the bill, at the then next term of the court, to be held on the 2d Monday of May.

At the May term, 1841, proof was made by affidavit, of the publication of this order, by advertisement for four successive weeks, in a newspaper published in Mobile, and by a copy posted on the court-house door. And by a decretal order of the chancellor, James West, with his consent, was appointed guardian, *ad litem*, of Caroline, Andrew, Henry, and Ethan A. Hitchcock, the minor defendants. This decretal order does not ascertain the respective ages of these infants.

West, the guardian *ad litem*, was served with *subpoena* on the 1st July, and thereby required to answer within thirty days after service. He answered the bill (at what time does not appear from the transcript,) denying all knowledge of the bond and mortgage, and requiring strict proof of the same.

The defendants, Cleveland, Humphries, and Edward Biddle, T. W. McCoy, Thaddeus Sanford, and the Life Insurance and Trust Company, filed separate answers, asserting several interests in the mortgaged premises, derived from Hitchcock subsequent to the mortgage, and alleging that the unsold residue is more than sufficient to satisfy the sum remaining due on the complainant's bond. These defendants pray that their respective interests may be protected by the decree, and some of the answers admit, and others deny, and require proof of the complainant's bond and mortgage. These answers are dated between the 10th and 16th of November, 1841. In the transcript also appears the answer of one James Brown, asserting an interest in the premises, but he does not appear to have been made a party defendant, either in the bill or by any subsequent proceeding.

At the November term, and on the 16th day of that month, a decretal order was made, that the allegations of the bill should be taken as confessed "against the defendants who had not answered," and the case was submitted for a decree on the bill, answers on file, and the decree *pro confesso*. On the next day the case was submitted to the master to take and state an account between the parties; to ascertain and report the amount of debt due to the complainants, and the order in which the mortgaged premises ought to be sold, in respect to the subsequent incumbrances held by some of the defendants.

The report of the master was made on the 18th of the same month, and was "that the mortgage was proved to have been regularly executed and recorded; that the bond, to secure which,

&c., was also produced and proved to have been duly recorded;" that $6001 47-100 remained due, for principal and interest on the bond, on the 20th November, 1841, and that a certain portion of the mortgaged premises was sufficient to produce that sum, and should be first sold.

On the 20th of November, a decree was rendered, which recites that the parties came by their solicitors, and by consent it was decreed that the master's report should be confirmed; that the amount ascertained to be due should be paid by the defendants to the complainants within sixty days, and in default of such payment, the portion of the mortgaged estate mentioned in the report should be sold, &c.

The proceedings stood in this condition when the defendant Erwin, sued out the writ of error on the 7th March, 1842. In April afterwards, the master submitted a statement under oath to the chancellor, at a term of the court then in session, which shewed a mistake in marshalling the mortgaged estate, and an order was then made directing him to rectify the mistake. This was done in an amended report, and a final decree then rendered, *nunc pro tunc*, as of the date of the former decree, directing the order in which the entire mortgaged premises should be sold, unless the complainants demand was satisfied by selling a less quantity.

A great number of errors were assigned, which need not be here recited, as those decisive of the case are examined by the court.

STEWART, for the plaintiffs in error.
LESESNE, *contra.*

GOLDTHWAITE, J.—The questions which have been raised with respect to the parties to this bill, the manner in which the service has been perfected on the defendants, and the decree as against those who are absent, have a preference of examination, because, if decided adversely to the complainants, the investigation of the other points will be rendered unnecessary.

1. We propose then, first, to consider who are the necessary parties, as complainants, to this bill; and if others are joined, whether this can so affect the decree as to cause its reversal.

There is much apparent conflict of decision upon the subject of parties, and it seems to have arisen from the very cautious manner

in which the courts of equity have felt their way to their present extensive and salutary jurisdiction over all classes of mortgages. The estate created by a mortgage, was at first considered by courts of equity, as well as by those of law, as absolutely vested in the mortgagee by a forfeiture of the condition; and when the former, by virtue of their extraordinary powers, first opened the condition, and compelled the mortgagee to take his money and re-convey, they sought out the parties on whom the legal estate was cast. When, subsequently the same courts began to compel the mortgagor to render justice to the mortgagee, it was ascertained that cases existed, in which the latter had no interest, in consequence of the assignment of the debt voluntarily, or by operation of law. In other words, the legal estate under the mortgage and the equitable interest in it, in consequence of the assignment of the debt, became vested in different individuals. Even under such circumstances, the courts endeavored to adhere to rules which had governed the first class of cases, and the original mortgagee, or his heirs, were continued as parties, although it was entirely evident that they had no interest in the litigation, and would not even be permitted to re-convey the equity of redemption, to the prejudice of the right of him who was entitled to the debt. It is somewhat doubtful, whether the English courts of chancery, do not adhere to these rules at the present day, as some recent cases hold, that the person having the apparent legal interest under the mortgage, is an indispensable party, either as complainant or defendant. [Scott v. Nichol, 3 Russ. 476; Ward v. Williams, 4 Madd. 186. See also Mitford, 179; Cathcart v. Lewis, 3 Bro. C. R. 516; S. C. 1 Vesey, jr. 463; Ray v. Fenwick, 3 Brow. R. 25.] We say it is doubtful, because in analogous cases, and when the same rule, if it is the correct one, ought to govern, the same courts, have held, that the assignor of a mortgage security is not an indispensable party when a bill to foreclose is brought by his assignee. [Bruce v. Harrington, 2 Atk. 235; Blake v. Jones, 3 Anst. 651. See also Miller v. Bear, 3 Paige 467; Whitney v. McKinney, 7 Johns. Ch. 144; Trecothic v. Mason, 4 Mason 41.]

In the American courts, from the earliest period, courts of law, as well as courts of equity, have considered mortgages in a more practical point of view, and the legal estate is considered as remaining in the mortgagor, for all purposes, even after a forfeit

ure of the condition until an actual entry is made by the mortgagee. [4 Kent's Com. 160; Clark v. Beach, 6 Conn. 142.] And it is doubtless with reference to these American decisions, as well as with regard to the apparent conflict of the English cases, that Judge Story doubts the correctness of the rule laid down in Mitford, and says, "when the assignment is absolute, and unconditional, leaving no equitable interest whatever in the assignor, and the extent or validity of the assignment is not doubted or denied, and there is no remaining liability in the assignor to be affected by the decree, it is not necessary to make him a party. At most, he is merely a nominal or formal party in such a case. It is a very different question, whether he may not properly be made a party, as the legal owner, although no decree is sought against him, for in many cases, a person may be made a party, although he is not indispensable. [Story's Eq. Plead. 147, § 153.]

If we were called on to consider the estate conveyed by this mortgage in a mere legal aspect, it may be conceded to be a joint tenancy in both the mortgagees; and, as the right of survivorship in such estates is here destroyed by statute, on the death of Ogden, his heirs inherited his legal estate; but under no circumstances, can his executors, unless they are devisees of his real estate, claim any legal right under the mortgage, or equitable interest in the land secured by it. The legal estate, such as it is, must descend to his heirs; the legal as well as the equitable interest in the bond, remains with the survivor, who alone is competent to receive satisfaction for, or give a discharge of the debt; and consequently he is the only indispensable party complainant to this bill. It also follows that the executors of the deceased partner were improperly joined to this suit.

2. But although they are thus improperly joined as complainants, it is very clear that the defendants cannot in this place, for the past time, claim any advantage of this error. The objection could have been made by any one of the defendants on demurrer, but not otherwise. [Story's Eq. Plead. 292, § 509; 417, § 544.] The reason why the defendant is not permitted to avail himself of such a defect at the hearing, or on error is, that the plaintiff could have amended his bill if the error had been pointed out, and the defendant ought not to be allowed to start such an objection when the plaintiff is not a condition to amend.

It is thus shewn that the misjoinder of complainants cannot affect the cause at this stage of the proceedings.

3. As to parties defendant to a bill to foreclose, the rule seems to be that the heir or devisee of a mortgagor, who dies the owner of the fee, is an indispensable party. [Story Eq. Plea. 181, § 196; Duvall's heirs v. McLoskey, 1 Ala. Rep. N. S. 708.] If, however, the estate has been conveyed by him, or assigned by operation of law, then only the assignee need be made a party; [ib. 182, § 197; Wilkins and Hall v. Wilkins, 4 Porter 245.]

In this case it is not material to inquire whether the personal representative of the deceased mortgagor is an indispensable party to a bill seeking a sale, because it is conceded by all the cases that such personal representative may be made a party, if the complainant chooses to proceed for an account. [Story's Eq. Pl. 182, § 197. See also Wilkins v. Wilkins, 4 Porter 245; Inge's heirs v. Boardman, 2 Ala. Rep. N. S. 331.]

The bill does not allege that any absolute assignment was made by the mortgagor of the estate during his life time, and therefore we conclude that his heirs at law are indispensable parties; and as such, the complainant insists they are made.

4. It is true, the bill does not technically allege that the *children* of the deceased mortgagor are also his heirs at law, but we think it would be a most strained conclusion that they were not. We may imagine cases in which *children* are not necessarily *heirs*, but they are where there can be no heirs, as in the case of an alien, or where an alien is naturalized having adult alien children. We will assume that the legal presumption is that every owner of land, is a citizen, and we think it equally just to conclude, in the absence of any shewing to the contrary, that the children of a citizen are *prima facie* his heirs. If the fact is contrary to this legal presumption, the case would then be a proper one to disclose the fact by plea and answer, but upon the face of the bill, we cannot discover that any one who should be a party defendant is not so.

5. If it be true, as supposed by counsel, that the executrix of the mortgagor, who refused to act, is improperly made a party, this is an objection personal to herself, and can only be raised on demurrer. [Story's Eq. Pl. 417, § 544.]

6. The next and only other matter intended to be examined, is that which relates to the manner in which the infant defendants

are brought before the court; and this will also extend to such of the other absent defendants as have not submitted to the jurisdiction, either by appearance or answer.

It has not been contended that courts of equity, as such, have any inherent jurisdiction over absent defendants, even if connected with property within the jurisdiction. Our statute seems to deny any such jurisdiction, unless the ground of action, or the transaction on which the bill is brought takes place within the State. [Digest 290, § 27.]

In such cases the statute provides "that any defendant against whom subpœna or other process may issue, who shall not cause an appearance to be entered within such time and in such manner as by the rules of the court, the same ought to have been entered, in case such subpœna or other process had been duly served; then, if affidavit is made that such defendant resides beyond the limits of the State, the court may make an order, directing such defendant to appear at a certain time therein named." A copy of this order is required to be published within forty days thereafter, in some gazette, regularly published within the State, for such space of time as the court shall direct. This order is also within the same time to be posted up at the door of the court house. where made. In addition to this, the court at its discretion may direct the order to be published in any gazette of the United States, for such space of time as it may deem reasonable. If after this, the defendant does not appear within the time limited by the order, or within such further time as the court shall appoint, then, on due proof of publication as aforesaid, the court may order the plaintiff's bill to be taken *pro confesso*.

The statute subsequently declares that the proceedings against absent defendants shall, notwithstanding be subject to certain restrictions and limitations. These are, 1st. That before obtaining any decree the complainant shall give bond to abide such order touching the restitution of the estate, or effects to be affected by such decree as the court may make concerning the same, on the appearance and petition of the defendant, to have the cause reheard. 2. If the decree is against a person residing beyond the limits of the State, at the time of pronouncing the same, and such person shall, within two years afterwards, reside within the State, or become publicly visible therein, then such defendant shall be served with a copy of the decree within a reasonable time after

such residence or appearance shall be known to the complainant. 3d. In case the defendant die within the two years, and before the service of the copy of the decree, and his heir have any real estate, of which possession shall have been given to the complainant, notice shall be given to him; or, in certain cases of disability, to his guardian; and in case of personal estate the notice is to be given to the personal representative. 4th. That the decree shall stand absolutely confirmed against such person as shall have notice, if he shall not appear within twelve months after service and petition to have the cause reheard. 5th. If the person served with such copy of the decree within twelve months thereafter, or if any person not so served within three years after such decree, shall appear and petition to be heard touching the matter of the decree, and shall pay all costs, such person or his representatives, or any one claiming under him by virtue of any act done before the commencement of the suit, may be admitted to answer the bill; and such proceedings shall be had as if no decree had passed. 6th. After three years from the decree, if there is no appearance, the same shall stand absolutely confirmed. [Digest, 289, § 23 to 27.]

The 13th section of the act of 1841, authorises the several registers to grant orders of publication, and the 14th section, when regulating the mode by which guardians, *ad litem*, for infants, shall be appointed, expressly directs that when minors of any age reside out of the State, publication shall be made as in other cases.

The order for publication in this case, was made by the register at the rules in April, 1841, and consequently is to be governed by the acts recited, and not by the rules of chancery practice adopted at the January term of the same year, because these last were not to take effect until the first of May thereafter.

After what this court declared to be the proper course with respect to infant defendants, in the case of Walker v. Hallet, [1 Ala. Rep. N. S. 379,] it was to be expected that their rights would be scrutinized, and if necessary, protected; but that has not been done in this case. The record does not disclose that there was any proof of the actual minority of these parties, and for that reason if for no other, the judgment, upon the authority of that case, must be reversed.

We may remark that the present rules afford ample protection

to this class of suiters, when considered in connection with the statute.

7. It is urged also, that these proceedings are not warranted, inasmuch as the statute requires a subpœna or other process to issue. It is true the statute might bear such a construction, but we do not think it was intended to make a useless act important to the service of process. The fact of absence or non-residence can be better and more safely ascertained by affidavit, than by a mere office return; and there is no reason for supposing that mere delay was intended by the statute. Our conclusion is, that the order was properly made by the register upon the affidavit, so far as the mere non-residence is concerned. Under the amended rules, it is perhaps requisite, in the case of infant defendants, who are non-resident, that their ages and places of abode should also appear.

8. It is very evident from the statute we have in part recited, that the legislature has guarded the rights of absent defendants with the utmost solicitude; and it is impossible to sustain this decree against those who have not voluntarily submitted to the jurisdiction, without declaring the statute inoperative, because the bond required to be given in all cases where there are such defendants decreed against, does not appear to have been executed.

9. If the adult defendants who have not answered are necessary parties to the bill, their rights are prejudiced by the decree, and therefore they have the right to insist on the bond. But it is indispensable with respect to those of the infants who are non residents, for the reason that they are indispensable parties. The authority to appoint a guardian *ad litem*, is vested with the chancellor, in order that the interests of the infant may be protected; but if the protection thus thrown around them in one aspect of the case, is to be construed as a voluntary appearance and submission to the decree of the court, then they are deprived of the bond, which adult non-residents cannot be deprived of, except by a voluntary appearance. Consequently, they are in a worse condition than if they were adults. To give such a construction to the appointment of a guardian, or to his answer for his wards, would be at variance with the well recognized rule that every thing will be intended in favor of infants, and nothing against them, and it ought not to prevail unless the legislature has clearly directed it.

This in our opinion is not the case, and, for the errors we have

considered, the decree of the chancellor is reversed, and the cause remanded for further proceedings.

MINGE & RUSSELL v. CURRY & CO.

1. The plaintiffs declared against M. & R. *first*, on a promissory note made by the N. O. & M. Mail Line; *second*, on a note signed "N. O. & M. Mail Line by M. & R. agts;" to which there was the plea of *non assumpsit: Held*, that the agency of the defendants being conceded, the notes were obligatory upon the N. O. & M. Mail Line: but the general issue having admitted the legal sufficiency of the declaration, and merely denied the truth of the facts alleged, the defendants could not raise the legal question before the jury, whether the notes were their promises—that point should have been presented by a demurrer to the declaration.

WRIT of Error to the County Court of Mobile.

The defendants in error declared against the plaintiffs, in *assumpsit*, in several counts. The first count sets out a promissory note, as follows:

"Mobile, June 9th, 1838.

$160 54-100. Thirty days after date, the New-Orleans and Mobile Mail Line promises to pay Messrs. James Curry & Co., or bearer, one hundred and sixty 54-100 dollars, for value received, negotiable and payable at the Planters' and Merchants' Bank of Mobile."

The second is on a note in *haec verba*.

"Due J. Curry & Co., or bearer, seventy-six 18-100 dollars. $76 18. Mobile, 27 Dec. 1838.

NEW ORLEANS AND MOBILE MAIL LINE,
By MINGE & RUSSELL, Ag'ts."

The third and fourth embrace the common counts in *assumpsit*.

To the entire declaration, the defendants pleaded *non assumpsit*, payment and set-off, and issues being thereupon joined, the cause was submitted to a jury, who found a verdict for the plain-

tiffs. On the trial the defendants excepted to certain decisions of the presiding judge. The plaintiffs offered in evidence, to support the first and second counts of the declaration, the notes above set forth, to which the defendants objected, but their objection was overruled, and the notes allowed to go to the jury. The plaintiffs then proved that the defendants were the agents of the "New Orleans and Mobile mail line;" that they ordered the work to be done by the plaintiffs, and after it was done, agreed to pay for it; and it was not until such a promise was made, that the plaintiffs would deliver it.

It was proved that when the plaintiffs handed their account to the defendants for settlement, the latter refused to give their own note, but gave the notes of the "New Orleans and Mobile mail line," which were accepted in payment. There was no evidence that any effort had been made to collect the notes of the mail line, and the plaintiffs had retained them in their hands ever since they received them. The court charged the jury, that if the defendants ordered the work, and promised to pay for it, the plaintiffs were entitled to recover in this action.

The defendants moved the court to charge the jury, that if they believed the defendants refused to give their individual notes when the settlement was made, and the plaintiffs received the notes declared on in payment, the plaintiffs are not entitled to recover. That if the jury believe that no effort was made to recover the notes of the "New Orleans and Mobile mail line," and they were not returned or offered to be returned to the defendants until the trial, the plaintiffs cannot recover. Which charges the court refused to give: and thereupon the defendants excepted to the admission of the evidence, and to the charges given and refused.

Campbell, for the plaintiffs in error.

COLLIER, C. J.—The notes set out in the declaration are not *per se* binding upon the defendants, but they import *prima facie*, a liability of the "New Orleans and Mobile mail line."—*Prima facie* we say, because in an action against the mail line, it would be allowable for its members to deny by plea, the authority of those who professed to be its agents, to make notes in its name; and unless the plea was disproved, defeat a recovery.

[Lazarus, use, &c. v. Shearer, 2 Al. R. N. S. 718.] Had the 1st and 2d counts in the declaration been demurred to, they must have been adjudged insufficient to charge the defendants. But no objection was made to them in point of law; and the plea of *non assumpsit* is only a denial of the facts alleged in the declaration, and throws upon the plaintiffs the burthen of proving the truth of so many of the counts as he recovers on. [Arch. Civ. Plead. 177.]

The plea of *non assumpsit* puts the plaintiff to the proof of his whole case, and in answer the defendants may in general adduce any evidence which disproves the case set up by the plaintiffs, and shows that at the time when the action was brought, the plaintiffs had no cause of action, or at least no right to maintain the action of *assumpsit*. In the present case, it is not a matter of doubt whether the notes were intended to bind the defendants to the payment of the money; for if the agency of the defendants is conceded, the notes are an engagement of the mail line to pay, and so import on their face; and consequently parol evidence is inadmissible to vary their legal effect. If it were doubtful, from an inspection of the notes, whether they were intended to charge the defendants or the association they represented, it would have been allowable for the former to have denied by plea, under oath, that they were their notes. [Lazarus, use, &c. v. Shearer, 2 Al. Rep. N. S. 718.] But such not being their character, they should have demurred, and cannot be allowed to raise by evidence the legal questions which are waived by a plea merely contesting the truth of the facts alleged.

The evidence adduced by the defendants, merely shows, that the notes were not intended to impose a personal liability upon them, and the charges prayed and refused, have reference to such a state of fact; while the legal sufficiency of the declaration is admitted, and asserts the reverse. Under the state of the pleadings, the objections attempted to be raised on error, cannot be revised; and the judgment of the county court is consequently affirmed.

BONDURANT, ET ALS. v. THE BANK OF THE STATE OF ALABAMA.

1. The intention of the legislature, in the passage of the act of the 9th January, 1841, was to give the summary remedy by motion against the sureties of a sheriff, or any of them upon whom service of notice was effected, in all cases where they were liable in this summary mode for the default of the sheriff, without notice to the sheriff, in the same manner as if he was notified.
2. The sureties of a sheriff may be proceeded against upon a suggestion that the sheriff has made a false return, without notice to him, they having received notice that the suggestion would be made.

ERROR to the Circuit Court of Tuscaloosa.

This was a proceeding against the sheriff of Marengo, and his sureties, suggesting that the sheriff had made a false return upon an execution issued in favor of the Bank. A notice issued and was served on several of the sureties, but not upon the sheriff. The sureties upon whom notice was served, appeared by their counsel, and the court was requested by the counsel for the Bank to cause an issue to be made up to try the falsity of the return, but refused on the ground that the sheriff had not been notified of the intended suggestion, and on motion of the defendants' counsel, and upon the refusal of the counsel for the Bank to take steps to notify the sheriff, quashed the suggestion, and rendered a judgment for costs against the Bank, from which this writ is prosecuted.

The error assigned, is the judgment of the Court quashing the suggestion.

PORTER, for plaintiff in error.
PECK & CLARKE, *contra.*

ORMOND, J.—In the case of Williamson & Daniel v. The Branch Bank at Montgomery, [2 Ala. Rep. 504,] we held, that under the act of 9th January, 1841, a judgment could be obtained, by motion, against the sureties of a sheriff for failing to pay over money which he had collected, on notice to them, although

no notice had issued to the sheriff. It is now insisted, that the act of 1841 does not reach the case of a false return by the sheriff; that a false return implies fraud, and that such an imputation should not be fixed on the sheriff without his having had notice to appear and contest it.

The language of the act in question is, "that hereafter when a rule or notice shall issue against any late or acting sheriff and his securities in office, in any case now authorized by law, it shall be competent for the plaintiff, in such rule or notice to recover judgment against such of the parties as service may have been effected on, any law, usage or custom to the contrary notwithstanding."

It is impossible to entertain a doubt about the intention of the legislature in the passage of this act; it was passed to remedy a defect in the existing law which was made apparent by the case of Orr v. Duval, [1 Ala. Rep. 262,] that judgment could not be obtained against the sureties of a sheriff for his default, by motion, until he was notified of the intended motion. The clear and manifest design therefore, was to give this summary remedy against the sureties of a sheriff or any of them, without notice to the sheriff, in all cases where they were liable in this summary mode for the default of the sheriff, *they being notified of the intended motion.*

The statute declaring their liability, [Aik. Dig. 174, § 77,] provides "that whenever any sheriff, &c. shall make any return on an execution, which the plaintiff shall suggest to the court to be a false return, the court shall forthwith cause an issue to be made up to try the falsity of the return; and if the return be found false, judgment shall be rendered against the said sheriff and his securities, or any or either of them, for the amount of money specified in the execution, together with ten per centum damages, and costs of suit."

Although this statute did not in terms require a notice to be served on the sheriff, yet such was the intention of the legislature, as has been repeatedly held by this court, and unless notice be given, either after the suggestion is made to the court, or previously, that such a suggestion will be made, no judgment could be obtained. This case, therefore, comes within the letter of the act of 1841. The plaintiff, then, had a right to proceed against such of the sureties of the sheriff as were notified of the intended suggestion in the same mode as it could have proceeded

against the sheriff if service of notice had been effected on him. The Court therefore erred in quashing the suggestion, and rendering judgment against the plaintiff; and its judgment must be reversed, and the cause remanded.

BATRE, ET AL. v. AUZE'S HEIRS, &c.

1. Under our statute providing the manner by which absent defendants shall be brought before a court of equity, publication is required to be made on the court house door, as well as in a newspaper, and if omitted, a decree cannot be sustained.
2. When a bill is filed by a vendor to enforce his lien for the purchase money, his vendee, who has parted with all his interest in the land to another, is not an indispensable party defendant to the bill; but he may be joined at the election of the complainant, and when a party, is concluded by the decree.
3. A complainant having elected to join a party who could have been dispensed with, cannot after, on error, avoid the consequences of a defective service, on the ground that he was not an indispensable party.
4. When the answer of a defendant shows an outstanding interest in one not made a party to the bill, but the answer is not sustained by proof, there is no necessity to make such person a party.
5. When a suit has been irregularly reversed, no waiver of the irregularity can be presumed against a party who was not before the court, by service or publication. *Quere*—as to those parties who submit to proceed after the irregular revival.
6. In a bill filed by the vendor of lands, to enforce his lien for the purchase money after the complainant's death, his personal representatives, and not his heirs, are the parties entitled to service; and if both join in reviving the suit, it is an irregularity which can be reached by demurrer, but not in the first instance upon error.
7. In a bill filed against a sub-purchaser to enforce the vendor's lien for the purchase money, due from the first purchaser, after the death of the sub-purchaser, the suit must be revived against his heirs at law, unless he has parted with his interest by assignment or devise; and if the suit is revived againsnt his personal representatives only, it is error.

WRIT af Error to the Court of Chancery for the first District of the Southern Division.

This bill was filed in December, 1837, and seeks to enforce an equitable lien on certain real estate. The complainant, Joseph Auze, alleges that in March, 1836, he was seized in fee of a certain lot of land, in Mobile, and then sold one undivided half of the same to the defendant, Lefebre, for the sum of ten thousand dollars, and conveyed it to him, taking his notes without any security whatever for the purchase money. That the defendant, Charles Batre, is a purchaser of the said undivided half from Lefebre, with notice that the purchase money was unpaid by him. The bill charges, that a considerable part of the purchase money remains unpaid, and prays that the land may be decreed subject to the lien, and sold. Process of subpœna issued against both defendants, but was served on Batre only, and returned not found as to Lefebre.

On the return of the subpœna, it was shewn to the court that Lefebre resided without the limits of the State, and it was ordered that he should appear, plead, answer or demur to the bill on or before the first day of the next term, or the same would be taken *pro confesso*, and set for hearing *exparte*. This order was directed to be published once a week for six weeks, in the ——— a paper printed and published in Mobile, At the next term, (April 1838,) proof of publication in the Mobile Register, was made, and Lefebre made a party, but no further order against him was here or subsequently made.

At the same term, the death of the defendant Batre, was suggested, and an order made that the complainant should be allowed to file a bill of revivor as to Batre's heirs. At the next term, (October, 1838,) the death of the complainant was suggested and leave given to revive the bill in the name of his representatives and heirs. The death of Batre was again suggested, and leave given to revive against his heirs and representatives.

Previous to Batre's death, he had filed an answer, which admits his knowledge that the purchase money due from Lefebre to Auze, was not entirely paid, but insists that there was no intention to retain any lien when the sale was made. In addition to this, that a custom has prevailed in Mobile, to consider all liens as discharged, when no specific mortgage is taken.

The answer also sets out that a considerable part of the purchase money was paid by Lefebre to Auze, out of funds belonging to C. & A. Batre, from which it is insisted that the equity of

these parties is equal to that of Auze. This money thus appropriated, and the balance of Lefebre's general account with C. & A. Batre, was the consideration for the transfer of the lot to Charles Batre. The answer also insists that the notes given by Lefebre to Auze, for the purchase money of the lot had been transferred to other persons, and therefore prays full proof of the right of the complainant.

No bill of revivor in point of fact was filed, but the replication to the answer, filed in May, 1839, is entitled in the names of Charles Auze, executor of Joseph Auze, deceased; Joseph, Adele, Alfred, and Josephine Auze, and Henry Roser, and Clara, his wife, formerly Clara Auze, heirs of Joseph Auze, deceased, and against Adele Batre, executrix and sole devisee of Charles Batre, deceased.

At the April term, 1839, the cause is stated as having been continued by consent of parties, but at the next fall term, the death of Batre is again suggested, and leave given to the complainants to revive the suit, as he may be advised.

At the next term, May, 1840, by consent of parties, it was ordered that Adele Batre, executrix and devisee of Charles Batre, should be made a party defendant to the cause, and afterwards during the same term, the cause was heard on the bill, answer and replication, when it was referred to the master to take an account between the parties, and report what was due to the complainants. The master, after two reports, which were set aside, reported the sum due to the complainants on two notes outstanding, to be $6901 96-100, which he credited with $565 25-100, being the one half of the rents and profits received by Auze or his representatives for the entire premises, of which the one half was conveyed to Batre by Lefebre, as stated in the bill, leaing a balance due to the complainants of $6,336 71-100.

The defendants excepted to this report,

1st. Because the time of notice was too short, having been given at 12 o'clock of the same day that the account would be taken at 4 o'clock. The defendant having summoned three witnesses, and only one attending.

2d. Because the whole amount of the account of rents filed has not been allowed as a credit, but only the one half. These exceptions were overruled, and a decree rendered subjecting the lands to the payment of the debt, as ascertained by the master's

report, and directing a sale, unless the amount was paid within sixty days.

From this decree, the defendants prosecute their writ of error, and assign as causes for reversal,

1. That Lefebre was not properly made a party to the suit; the proceedings against him for that purpose being insufficient.

2. That by the answer, an interest is disclosed to be in Adolph Batre, who, therefore, was a necessary party to the suit, this interest being affected by the decree.

3. There was no proof before the court of the allegations of the bill, and nothing was before the court to warrant the decree.

4. That the court erred in rendering a decree from the position in which the defendant Lefebre, stood in the cause.

5. That a decree was rendered before the cause was at issue.

6. That the court erred in the principle of the decree, because no lien existed under the facts disclosed by the bill.

7. That no bill of revivor was filed after the death of Auze, and there was no proof of the rights or character of the parties named in the replication, and the parties there named are improperly joined.

8. The court had no sufficient information either from the pleadings or proofs of the interests of the defendant in the estate of Charles Batre. Nor was there any allegation to charge her, or opportunity given her to plead or answer.

9. For confirming the master's report against the exceptions taken.

10. That the decree was rendered without the production of any evidence, and because there is nothing in the record to sanction it.

CAMPBELL, for the plaintiff in error.
HOPKINS, *contra.*

GOLDTHWAITE, J.—The principal question in this case, and the only one which involves the equity of the bill has not been discussed by the counsel for the plaintiffs in error; and whether it is considered as a mooted question, or otherwise, we ought not to decide it, if the other points made are sufficient to reverse the decree.

1. The first matter urged for our consideration is, that the defendant, Lefebre, was not properly before the court, so that any decree could be made affecting his rights. It will be seen that there was no personal service of the subpœna on him, and he is attempted to be brought before the court as a non-resident defendant. The consideration which the statute governing the mode by which this class of suitors are to be brought before our courts of chancery, has recently received, in the case of Erwin v. Ferguson, *supra*, renders it unnecessary here to say more than that we consider the service as defective, because it does not appear that any publication was made on the court house door, as the statute requires, as well as in a newspaper. [Digest, 289, § 23.]

2. In avoidance of this defect in the service, it is urged that Lefebre was not an indispensable party to the bill, and as no decree is rendered against him, the error is entirely immaterial. The case made by the bill is very similar in all its analogies to a mortgage; indeed the lien of a vendor for the purchase money is considered as an equitable mortgage by the elementary writers. In the relation which Lefebre stands to the land, having parted with all his interest to Batre, by sale and conveyance, it is certain he is not an indispensable party; but it is equally certain we think, that he could be joined as a defendant at the election of the plaintiff. It might be important to have him before the court for the taking of an account, or in order to conclude him by the decree, as was held in Brooks v. Harrison, [2 Ala. Rep. N. S. 209.] It is true, in that case, we considered a party standing in a somewhat similar relation to the case, as an indispensable party, but the facts were peculiar, and seemed to make an exception to the general rule.

In the present case it may be conceded that the decree is not against Lefebre, personally, but we conceive its effect is such as conclude him from setting up any defence if a suit should be instituted against him by Batre's heirs.

3. The consequence is, that the complainants cannot now say that it was useless for them to bring him before the court, because the election was with them to make him a party, and if not a necessary one, they could at any time have dismissed him from the suit. It is not for us to speculate how the decree will affect this defendant; it is sufficient that under certain circumstances it may do so.

4. With respect to the supposed interest of Adolph Batre, disclosed, by the answer of the executrix of Charles Batre, it is sufficient to say, that however asserted, no such interest was shown at the hearing, and therefore, without any enquiry into the necessity for making him a party upon the case made by the answer, this matter cannot avail the defendant here.

5. The fact being ascertained that one of the defendants was not before the court at the time of the decree, it follows, so far as he is concerned, there is no waiver of the irregular manner in which the suit was revived after the death of the original complainant, Auze. The proper mode to revive the suit was by bill of revivor, on the part of those entitled at his death to his interest in the estate. [Heirs of Duval v. McLoskey, 1 Ala. Rep. N. S. 708.] The amended rules now permit a revival in another mode, but they cannot have the effect to cure the error in this case. We are not prepared to say that if all the defendants submit to proceed after an irregular revival of a decree, that they would be heard against the irregularity.

6. It is further urged, that independent of the manner in which suit was revived, the heirs of Auze are improperly joined as complainants, with his personal representatives. In the case of Erwin v. Ferguson, *supra*, we had occasion to examine the subject of parties to bills of this description, and then came to the conclusion that the heir of a joint mortgagee was not an indispensable party to a bill to foreclose or sell, inasmuch as he had no legal or equitable interest in the debt secured by the mortgage. We also examined the English rule as laid down by Mitford, and endeavored to show that it never had prevailed in the American courts. As this is the case of a mere equitable mortgage, there can be no pretence that the heirs of Auze have any equitable interest in the debt, and they certainly have no apparent legal interest in the land. The consequence is that they are improper parties and if the objection had been taken on demurrer, their names would have been stricken from the bill on an order to amend. The objection is too late upon error. [Erwin v. Ferguson, *supra.*]

7. It is also urged that no reason is shown by the pleadings, why the executrix of Charles Batre, and not his heirs at law, are made parties upon the revival of this suit. It is held by all the authorities, that where a mortgagor, who is the owner of the fee, dies, his heir or devisee, is an indispensable party to a bill to fore-

close; so much so, that if he is without the jurisdiction of the court, the cause cannot be further proceeded in. [Story's Eq. Pl. 181, § 196.] It is not the mortgagor here who is dead, but the person who is invested with all his interest. The analogy therefore is, that his heirs are indispensable parties, unless it is shown affirmatively that they have no interest in consequence of an assignment or devise by their ancestor. The omission of a party, who is indispensable to a bill, is a defect which will cause a decree to be reversed, on a rehearing, or appeal. [Story's Eq. Pl. 77, § 75; Mechanics Bank v. Seton, 1 Peters, 299.] But notwithstanding such an error is sufficient to work a reversal, the bill ought not to be dismissed until an opportunity is given to make the proper parties. [Story's Eq. Pl. 415, § 541.]

These conclusions render it necessary to reverse the decree and remand the cause, and relieve us from the consideration of the other questions presented, it being probable they will not again arise.

YOUNG v. THE BANK OF THE STATE OF ALABAMA.

1. The defendant called for an account of sales of his cotton, which was in the plaintiff's possession, and upon its being produced, offered it as evidence for the single purpose of showing when the sale was made: *Held*, that the use of the paper by the defendant, was an admission of its genuiness, and made it admissible for the plaintiff to prove the facts shown by it.

Writ of Error to the County Court of Tuskaloosa.

This was a summary proceeding by notice and motion, at the suit of the defendant in error, against the plaintiff, as the acceptor of a bill of exchange. The cause was tried on the pleas of *non assumpsit*, payment, and set off. On the trial, the defendant excepted to the ruling of the presiding judge. It appears that the proceeds of forty-eight bales of cotton belonging to the defendant

had been appropriated in part payment of the bill, on which the Bank claimed a balance. That the defendant offered a paper purporting to be an account of sales of the cotton, which paper was in the hands of the cashier of the Bank, (without proof of an authority to sell or of any thing else) declaring that he offered it for the sole purpose of showing when the sale was made. The plaintiff's attorney afterwards offered the same paper as evidence to prove all the facts it indicated, without any proof in aid of it; to which the defendant objected, but his objection was overruled, and the entire paper read to the jury.

The defendant also objected to the construction given by the Judge in his charge to the jury, to the fourth article of the regulations under which the cotton was received and sold by the Bank. That article is as follows, "all expences of freight, commissions, insurance, &c. shall be paid by the party for whose account and risk the cotton is shipped. The shipper may limit or fix the price, and the time at which he desires the cotton to be sold; but the limit as to price and time, must terminate at the expiration of four months from the time of its arrival in a foreign port, at which period the sales must be closed." The charge excepted to, stated the law thus, that where there were no instructions given by the shipper of the cotton, the Bank could not sell until the expiration of four months—it had no right to sell or exercise any contol over the cotton until that period had expired; after that time the Bank could sell if it saw proper, or withhold the cotton from market as long as it thought the interest of either party would be thereby promoted.

In the bill of exceptions it is stated, that there was no evidence of the defendant having given any instructions in relation to the sale of his cotton, or that the same had been sold within four months after its arrival in a foreign port, or immediately upon the expiration of that period.

Lindsay, Attorney General, for the plaintiff in error. The introduction of the account of sales for a single purpose by the defendant below, did not authorise the adverse party to use it as evidence generally. [1 Starkie's Evi. 251, 319, 320, 321.]

B. F. Porter, for the defendant.

COLLIER, C. J.—It is a rule of very general application that where a paper is read by one party, the whole is to be read if required by the adverse party. This rule may be said to be founded upon the reason, that the reading of the entire document is necessary to ascertain with certainty, its real sense and meaning; and further, that by offering it as an instrument of evidence, its admissibility has been so far affirmed as to preclude objection to it, when introduced by the other side.

In Isaacs v. McGrath, [1 N. & McC. Rep. 563,] the law on this point is thus stated: "Where papers are called for by one party, which are in possession of the other, they ought not to be garbled, but the whole produced, subject however to all legal exceptions when produced; and that whenever a document or paper is referred to by any other, which is admissible evidence, such document or paper so referred to, ought to be produced." [3 Ph. Ev. C. & H's notes, 1207; 1 Stark. Ev. 6 Am. ed. 359; Withers v. Gillespy, 7 Sergt. & R. Rep. 14.] And it is laid down in general terms, that the books of a merchant, when offered by one party for the purpose of establishing a demand, may be used by his adversary to show a discharge, or that nothing is due. [2 Ph. Ev. C. & H's ed. 227 to 229, and cases cited.]

In the case at bar, the defendant called for the account of sales of his cotton in possession of the plaintiff, and used it as evidence of the time when it was sold. The use of the paper for this purpose was an admission that the cotton had been sold, and dispensed with proof of the genuineness of the paper, and made it evidence of the facts shown by it. It was therefore competent for the plaintiff to introduce it as evidence of the amount of the sales with which the Bank was chargeable; but it was not conclusive, and the defendant might have proved that the account was incorrect, or that the cotton sold for a smaller price than it would have done had the sale been made according to the contract between the parties, &c.

It is needless to consider the charge to the jury upon the fourth article of the regulations under which the cotton was received and sold, as there was an entire absence of proof to show, that the sale was not made in strict conformity thereto. Nor was it pretended, so far as we can learn from the bill of exceptions, that there was a departure by the plaintiff from the requirements of

that article; or if it was disregarded, that any injury has resulted to the defendant.

There is no error shown by the assignments, and the judgment is consequently affirmed.

STEPHENSON v. ROPER.

1. The endorsement on the writ cannot be looked to to show that the action was on a lost note.

ERROR to the Circuit Court of Pickens.

PECK & CLARKE, for plaintiff in error.
COCHRAN, *contra.*

ORMOND, J.—The judgment in this case was taken by default, the defendant having been regularly served with process. It is admitted that the judgment is regular, unless we look to the indorsement on the writ, by which it appears that the suit was commenced on a lost note.

In the case of Wharton v. Franks, [9 Porter, 232,] we held that a variance between the endorsement on the writ and the declaration, could not be pleaded in abatement; and in the case of Williams v. Powell, [same book, 493] that the indorsement on the writ cannot be referred to for the purpose of reversing a judgment. These decisions are decisive of this case, as without looking to the indorsement on the writ, it is impossible to know that this suit was on a note which was lost when the action was brought, and the default is an admission of all the facts stated in the declaration. We do not wish it understood, that if the fact of the loss of the note had appeared in the declaration, it would have varied the case; but it is not necessary now to determine that question.

Let the judgment be affirmed.

KEEBLES v. FORD AND VINING.

1. The dismissing of a suit as to one of three joint and several obligors, after service of process on all, and before any defence personal to that one is pleaded, is a discontinuance of the whole action.

WRIT of Error to the County Court of Madison county.

Action of *debt*, by Ford and Vining, on a bill single, made by the two Keebles and Rodah Horton. The summons issued against all the defendants, but was not served on Horton, as to whom there was a return of "not found." Afterwards an *alias* summons issued, and was served on Horton, and at its return the plaintiffs dismissed the suit as to him, and took a judgment by default against the two other defendants.

This judgment is now assigned as error.

MOORE, for the plaintiffs in error, insisted that the dismissing the suit against Horton was a discontinuance of the action.

W. COCHRAN, for the defendants, relied on Oliver v. Hutto, at this term.

GOLDTHWAITE, J.—It is argued that the *alias* summons issued without the assent of the plaintiffs, and is the unauthorised act of the clerk, by which they ought not to be injured. We are not authorised so to consider it, for the process was applicable to the condition of the case, when issued, and it was not a necessary part of the clerk's duty to issue it without instructions; it must therefore be considered as the act of the plaintiffs, and being so, they could have no judgment against the defendants at its return term, except by confession. [Meek's Sup. 13.]

The question here, however, is not as to the manner in which the plaintiffs might have conducted their suit, but as to the effect of thus dismissing it against one who appears to have been regularly in court.

It is a settled rule, that in general, a plaintiff cannot discharge any one defendant who is sued on a joint contract, without its op-

erating as a discontinuance of the action. [2 Saund. 207, note 2.] And though this rule has, with us, been changed by statute, [Dig. 267, § 56,] so as to allow a discontinuance against such defendants. in certain enumerated cases, as where some are not served with process; yet it has been held from a very early period in this State, that when such a suit as this is discontinued as to one, the action is discontinued as to all. [Adkins v. Allen, 1 Stew. 130; Harrington v. Smith, *supra*.]

We wish to be understood as limiting our decision solely to the case presented, as the rule very possibly may not extend to a discontinuance, after a defence, personal in its nature, has been interposed by the one who is afterwards discharged from the action. [Ivey v. Gamble, 7 Porter, 545.]

Our conclusion is, that the dismissal of Horton from the suit, was a discontinuance of the action as to the other defendants.

Let the judgment be reversed.

RICE v. BRANTLEY.

1. The act of 1818, declaring that every joint promissory note shall be construed to be joint and several in its legal effect, and that any one or more of the promissors may be sued, a plea by one against whom process issued alone, that he was a surety merely, that his principal died after the maturity of the note, and that certain persons (naming them) had administered on his estate within less than six months previous to the commencement of the suit, is not sufficient to abate the action.

Writ of Error to the County Court of Dallas.

The defendant in error declared in *assumpsit*, against the plaintiff, on a promissory note for the payment of four thousand four hundred and seventy dollars, made by plaintiff, and William C. Woods (who was not sued.) The defendant below pleaded in abatement, that William C. Woods made the note declared on

as principal, and himself as his surety; that since the same became due and owing, his principal died, and William G. Hale, Middleton H. Hale and A. R. Rembert were appointed administrators, with the will annexed, &c.; and that six months had not elapsed from the grant of administration when the writ in this cause issued. To this plea there was a demurrer, which was sustained; and the defendant declining to plead over, final judgment was rendered for the plaintiff.

G. W. Gayle, for the plaintiff in error.
Edwards, for the defendant.

COLLIER, C. J.—By the 33d section of the act of 1806, "concerning wills and testaments; the settlement of intestate's estates; and the duty of executors, administrators and guardians," [Aik. Dig. 152,] it is enacted as follows; "And to the end, that the executor or administrator may have an opportunity to ascertain the situation of the estate of the testator or intestate, no suit shall be commenced or sustained against such executor or administrator, in such capacity, until after the expiration of six months from the time of proving the will of the testator, or of granting letters of administration on the estate of the deceased." The act of 1818, "For the better regulation of judicial proceedings," [Aik. Dig. 267,] provides, that every joint promissory note, &c., shall be construed to have the same effect in law as a joint and several note, &c., and it shall be lawful to sue out process and proceed to judgment against any one or more of the makers, &c. thereof. Again; the act of 1828, "For the further relief of securities," [Aik. Dig. 386,] clearly shows, that the legislature supposed that it was allowable to sue in a separate action, a surety who had joined with his principal in making a promissory note. Upon any other hypothesis, that statute would not have authorized a surety when sued alone to give notice to his principal of the pendency of the suit, with a view to the recovery of a judgment for his indemnity.

The first statute cited merely suspends the remedy against an executor or administrator for six months, that the situation of the estate represented may be ascertained. It affords a privilege, personal to the representative, of which he may or may not avail himself; is properly pleadable in abatement, but does not at all affect

the rights of the creditor. It is not pretended that the defendant, though a surety, is not suable separately under the act of 1818, after the limitation as to executors and administrators has elapsed, nor indeed can such an argument be urged with success.

It is perfectly clear, as argued for the plaintiff in error, that the liability of the surety cannot be extended beyond that of his principal; but the argument is inapplicable to the defence set up by the plea. The suspension of a remedy against the representatives of his principal, does not operate a discharge in their favor, as we have seen. It cannot appear until they are sued, and actually plead the statute, that they would object to a suit before the expiration of the six months; and if such a plea were allowed by a surety, it would be, in effect, to permit the surety to avail himself of a defence which was personal to others.

In no view in which the plea can be considered, can it be supported without affecting the rights of the defendant in error. The statute which authorises an action against any one or more of the joint-makers of a promissory note, is opposed to it; and the judgment of the County Court is consequently affirmed.

DESHLER v. GUY.

1. An assignment in these words, "this note has been transferred to L. M. Guy by J. Weatherby" is sufficient to transfer the legal title to the note to Guy, if made by Weatherby, and being declared on as such, is under the statute of this State, *prima facie* evidence of the fact, unless the assignment is questioned by a sworn plea.

ERROR to the Circuit Court of Franklin.

This action was brought by the defendant in error as assignee, against the plaintiff in error as maker of a promissory note, of which one J. Weatherby was payee.

The defendant pleaded that the note sued on was executed by

him as the agent of the Tuscumbia, Courtland and Decatur Rail Road Company, and for slaves hired for the use of the company, and was taken, and accepted by the payee, as the note of the company. The plea was verified by affidavit. To this plea there was a demurrer, which the court overruled, and the plaintiff took issue on the plea. Upon the trial, the plaintiff offered in evidence to the jury, the note and endorsement on the back of the instrument, as follows: "This note has been transferred to Mr L. M. Guy by J. Weatherby." This being all the evidence offered by the plaintiff, the defendant's counsel moved the court to exclude the note and the endorsement from the jury; which motion the court overruled, and the defendant excepted.

Judgment being rendered for the plaintiff, the defendant prosecutes this writ, and assigns for error, the refusal of the court to exclude the testimony.

PECK, for the plaintiff in error.

COOPER, *contra*—cited 7 Porter, 454; 9 ib. 305.

ORMOND, J.—Wherever it is doubtful, from the face of the contract, whether it was intended to be obligatory on the person signing it, or to operate against, and be binding on, some third person as his principal, parol evidence is admissible to explain the instrument, and show the true nature of the transaction. [Lazarus v. Shearer, 2 Ala. Rep. 718.]

Such appears to be the character of the note in this case, and the issue to be tried by the jury was, whether the note was made by Deshler in his individual capacity, or as the agent of the Tuscumbia, Courtland and Decatur Rail Road Company, and so received by the payee: upon this issue, it is clear the *onus* was upon the plaintiff in error. *Prima facie*, the note bound him individually, and his plea was, that admitting such to be the *prima facie* intendment, the fact was otherwise, and was known to be so by the payee, when he received it; he therefore assumed the burden of showing that such was the fact. The making of the note by the plaintiff in error was a fact admitted by the pleadings; it was therefore unnecessary to read it to the jury as evidence, but the reading of it could not prejudice the defendant. The note was before the jury without a formal reading of it, to enable the plaintiff in error, by testimony, to explain and show in what charac-

ter it was made; it results therefore, necessarily, that it was not error for the court to refuse to exclude it from the jury.

The endorsement which was also read to the jury, is to the following effect: "This note has been transferred to Mr. L. M. Guy, by J. Weatherby." This endorsement, although not in the usual form, is certainly sufficient to transfer the legal title to the note, if it was made by Weatherby, who was the payee of the note. It is declared on as the assignment of Weatherby, and under our statute, did not require to be proved, unless the assignment was denied on oath. [Aik. Dig. 283.] No such plea was interposed, and the court therefore did not err in refusing to exclude it from the jury.

There is no error in the record, and it must therefore be affirmed.

VAN CLEAVE v. HAWORTH.

1. The third section of the act of 1835, [Digest, 621,] impliedly inhibits the issuing of an execution on a judgment then in existence, after a lapse of ten years, although one was sued out within the year and day, but never continued afterwards. And an execution issued after such a lapse of time without reviving the judgment by *sci. fa.* is irregular, and subject to be set aside.
2. The giving of a forthcoming bond is not a waiver of any irregularity in the execution.

Writ of Error to the Circuit Court of Madison county.

This is a petition for a supersedeas of an execution; it was allowed by a circuit judge, but the court to which it was returnable quashed it, and gave judgment for costs against the petitioner and his sureties. To reverse this judgment, the writ of error is now prosecuted. A bill of exceptions shows, that the facts stated in the petition were admitted by the adverse party to be true; and they are as follows: Haworth, in May 1827, recovered a judgment in the circuit court of Madison county against Van

Cleave, for one hundred and fifty dollars, debt, and twenty-three dollars, damages, besides costs; on this judgment, a writ of *ca. sa.* was sued out in June, of the same year, but no other execution was afterwards sued out until the 27th of February, 1841, when a *fi. fa.* issued. This was followed by another on the 25th April, 1842, on which a levy was made, and a forthcoming bond taken. On the return of this bond as forfeited, a *fi. fa.* was sued out on it, and thereupon the supersedeas was prayed on the 8th October, 1840.

Parsons, for the plaintiff in error, insisted that no execution could regularly issue on this judgment, in consequence of the lapse of more than ten years, without any proceeding whatever. [Dig. 2d ed. 621, § 3.

McClung, *contra*—argued that this statute was not intended to have a retro-active effect on judgments in force at its enactment, but only such as might afterwards be rendered. The irregularity, if there was any, is removed by the forthcoming bond.

GOLDTHWAITE, J.—1. It is apparent that more than ten years elapsed between the suing out of the executions, and the only question is, whether the last one can be quashed as having issued contrary to the provisions of the act of 1835.

This act is somewhat obscurely worded, and in order to show its bearing on the case under consideration, the whole of the third section must be examined. It provides that hereafter, when any execution shall have been issued on any judgment or decree of the supreme court, or any circuit court, or county court, within this State, or upon any judgment of any justice of the peace, within a year and a day after the rendition of any such judgment, or the making of any such decree, which shall not have been returned satisfied in full, it shall, and may be lawful at any time thereafter to issue execution on any such judgment or decree, without suing out any *scire facias*, or other process to revive the same. And when an execution shall have been issued or sued out on any such judgment or decree, which shall not have been returned satisfied in full, such judgment or decree shall not afterwards be presumed to be paid or satisfied, without payment or satisfaction be entered on the record of the court in which such judgment or decree

shall have been rendered or made, or, in case of a judgment of a justice of the peace, on the docket in which the judgment shall have been made; or on the execution issued on such judgment or decree, unless no execution shall be issued on any such judgment or decree, for the space of ten years.

If we ascertain the evil intended to be remedied by this enactment, we shall be furnished with some clue to its proper construction; it probably was, that the law with respect to the manner and necessity for reviving judgments by *scire facias*, when either a year and a day had elapsed without execution, or where, after execution issued, a period of years had intervened between it and another. That such evils, or supposed evils were in contemplation, is rendered more probable by the fourth section, which recites that doubts had arisen whether a *scire facias* would lie on a judgment where execution had not issued within a year and a day, and then provides that such writ may be sued out. It is to be remarked also, that the first clause of the third section provides for the right to sue out execution without any limitation other than ten years, after one had been issued within a year and a day. Such we understand the law was, before this enactment, both with respect to the right to sue the execution, and also the right to have a *sci. fa.* where no execution issued within the year and day.

The only new rule, then intended by this statute seems to be, that when a period of ten years elapses from the suing out of an execution, without any continuation of the process, the same presumption of satisfaction shall arise, as does from the omission to sue out execution within a year and a day.

Considering the third section by itself, we should have little doubt that this is the proper construction, but it seems to be rendered certain, by the fact that no absolute presumption of judgment arises where no execution whatever is sued out, although more than ten years have elapsed since the rendition of the judgment. The fourth section declares the right to sue out a *sci. fa.* in such a case without limitation, and the judgment is alone controlled by the limitation of twenty years, given by the general statute.

It would be very absurd to suppose that no absolute presumption could arise of payment, where there was an entire omission to sue out execution, for any period short of twenty years; and

yet to hold that the omission to continue one within ten years should create a complete bar.

We consider then, the presumption of payment spoken of in the last clause of the third section as only arising to such an extent that no execution can be sued out after a lapse of ten years, in continuing the process, without reviving the judgment by *scire facias*.

It is however contended by the defendant in error, that the statute must be construed to refer only to after acquired judgments, because it is not clear that it was intended to interfere with any right then existing. The consequence of such a construction would be to suppose the enactment of a law which would have no operation whatever for ten years, as would clearly be the case if the enactment does not attach to the execution instead of the judgment. Such an idea, as it probably never was conceived by the legislature, cannot be attached to the act. We see no peculiar hardship in putting a plaintiff to a *sci. fa.* when he has neglected to continue his execution for so long a period, and it was as much within the power of the legislature to make it apply after a lapse of one day, as for a longer period. This illustration may not be necessary to show the application of the statute to this particular case, under the facts, but it would be to the cases of judgments obtained in 1825, if execution on them had been omitted until the passage of the act.

2. It is also contended that this is a mere irregularity under the statute, and was waived by entering into the forthcoming bond. In the case of Page v. Coleman, [9 Porter, 275,] this point was considered, and we then held that the giving of such a bond was no waiver of a previous irregularity.

Our conclusion is, that Haworth was not entitled to sue out execution without reviving his judgment. The supersedeas therefore was properly sued out, and the execution complained of as irregular, should have been quashed.

Judgment reversed and remanded.

DEARMAN v. RADCLIFFE.

1. Where one receives personal property, which upon the happening of certain events, is to be distributed among other persons, upon his death, his personal representative will take it as a *trustee*, for those between whom it is to be divided; and such representative can make no division which will interfere with the rights of the *cestui que trust*.
2. Where an administratrix made a formal division of property of which she is possessed in that character, without any legal warrant therefor, and received nothing as an equivalent, he may successfully defend an action brought for its recovery by one to whom she has assigned a share.
3. Although a transfer of property made to delay, &c. creditors, is void as against the latter, it is valid as to the grantor, his heirs and distributees; and they cannot recover it of the representatives of the grantee.

WRIT of Error to the Circuit Court of Sumter.

This was an action of trover, at the suit of the defendant in error against the plaintiff.

R. H. SMITH, for the plaintiff in error.
JOHN ERWIN, for the defendant.

COLLIER, C. J.—The only question of law arising in this case, is presented by a bill of exceptions, the facts recited in which are almost identical with those of Dearman v. Dearman, at the last term. So far as it is necessary to notice them, they may be thus condensed. In the year 1830, Jonathan Dearman, then a citizen of Florida, was desirous of removing to Alabama, with his family, but apprehensive if he did so, with certain slaves as ostensibly his property, they would be subjected to the payment of some debts, which he had been owing in Mississippi, for a long time. To prevent such a result, his son William, (who claimed these slaves, under an exchange made with his father about eighteen years previously, when about twelve years of age) executed an absolute bill of sale to another son, Solomon; Jonathan joined in the execution of this bill of sale, which expressed upon its face a monied consideration of thirteen hundred dollars.

Solomon agreed upon receiving the bill of sale to retain possession of the slaves until his death, or until all the children of Jonathan should come of age, and then to divide them equally between the children. In the fall of 1832, the slaves were brought to Sumter county; Solomon came a short time thereafter, and retained them in his possession until his death, which occurred in July, 1838. The plaintiff in error, who is his widow, administered on his estate, and divided the slaves with the children of Jonathan, delivering them to the distributees according to the division; but was permitted by them to retain the slaves until they had gathered the crop left by her deceased husband. The plaintiff below intermarried with a daughter of Jonathan Dearman, and the action is brought for the conversion of the slaves allotted her.

The cause was tried on the plea of "not guilty," and the presiding judge charged the jury as follows: "that if Anna Dearman, in good faith, agreed to divide the slaves, and they were divided and delivered, and left with her to aid in gathering the crop, the plaintiff must recover, although the jury should believe, that the conveyance to Solomon, in Florida, was made to hinder, delay, or defraud the creditors of Jonathan Dearman."

In Dearman v. Dearman and Coffman, it was insisted, that the transfer of the slaves by William Dearman with the assent of his father to Solomon Dearman, was merely colourable, and intended to delay, hinder and defraud the creditors of the father, and consequently void. The court conceded, that if the sale to Solomon was a contrivance to enable Jonathan Dearman to avoid the payment of his debts, it might be defeated by those intended to be prejudiced, but would invest the fraudulent vendee with an unconditional estate as against the vendor and his heirs. Yet if the vendee had executed the contract by dividing the slaves, it would have been binding on him, for although the law will not enforce an executory contract founded in fraud, if it be executed and the parties are *in pari delicto*, it will not lend its aid to either. [See also Rochelle v. Harrison, 8 Porter's Rep. 352; Black & Manning v. Oliver, 1 Ala. Rep. N. S. 449.] But upon the death of Solomon Dearman, without having performed the condition on which he received the slaves, they vested in his personal representatives, subject to the claims of his creditors and distributees; and his administratrix thus holding them in trust for others, could

not make a division of the slaves which would interfere with the rights of the *cestuis que trust.*

The manner in which an executor or administrator may dispose of the estate of the testator or intestate is pointed out by statute, except in cases of testacy where the will may confer powers. [Aik. Dig. 180, § 13.] Under this statute it has been decided, "if there had been an actual sale made of the slaves in question to the plaintiff, by the administratrix, *privately*, and a full consideration paid, the title would not have passed as against the heirs, distributees or creditors." [Dearman v. Dearman and Coffman and Ventress v. Smith, 10 Peters' Rep. 161.]

But it has been intimated that the case of Pistole v. Street, administrator, [5 Porter's Rep. 64] shows, that although the plaintiff in error, as administratrix of her husband's estate, could not rightfully divide the slaves, yet having done the act, she could not defeat a recovery by setting up a want of authority. In that case, the administratrix married after the grant of administration, and the husband, who became administrator in right of his wife, sold some of the property of the estate at private sale. After the death of the husband, the wife brought an action in her representative character for the recovery of this property, and it was adjudged that the wife was as much bound by the act of the husband, as if it had been done by herself while *sole;* that whatever were the rights of the distributees and creditors, they could not be asserted by her, that she might thus indemnify herself against the consequences of a *devastavit.*

In that case the sale had been made for money, which the legal representative received, and the action was brought by one who stood in his shoes, seeking to disaffirm the contract, on the ground that it was made without authority, and in violation of good faith. But in the present case, the administratrix merely made a formal division of the slaves, without any legal warrant therefor, and received nothing as an equivalent. She is not an actor seeking to recover them, but merely insists upon her right to retain the possession, because the division to which she assented, transferred no title, and did not divest her legal estate. The question then is, not whether the defendant below could recover the slaves if they had remained with the allottees, but retaining the possession, can she resist a recovery by them? We think it clear, that she may.

This conclusion we think follows from what is said in Dearman v. Dearman & Coffman, and Ventress v. Smith, already cited.

If the transaction in Florida, in respect to the slaves, was made to delay, &c. the creditors of Jonathan Dearman, it was valid as to other persons, and vested in the administratrix of Solomon, for the benefit of his distributees and creditors, and she could not distribute them between the children of Jonathan. The division then, confered no property upon them and they could sustain no action against the administratrix by a deduction of title through such a source. In the action of trover, it is said to be necessary to prove, a property, either general or special in the plaintiff, and a right of possession at the time of the conversion by the defendant. [3 Starkie's Ev. 1418.] If the delivery of the slaves to the wife of the plaintiff, invested her with a special property, its return to the defendant, operated a divestiture of all interest, if the administratrix elect so to consider it. That such must be the consequence, seems to us to result from the fact, that the division was made without authority, and in opposition to law; without any consideration received, or intended to be given. A promise to return the slaves, after the crop was gathered, must be regarded as gratuitous, and not enforceable at law.

As the charge of the court so presents the case, we have considered it upon the hypothesis, that the transfer of the slaves in Florida, was intended to defraud the creditors of Jonathan Dearman, and upon this assumption, our conclusion is, that the judgment of the Circuit Court must be reversed, and the cause remanded.

RICHARDS AND OTHERS, v. GRIFFIN.

1. Where one of two defendants prosecutes a writ of error, from the county to the circuit court, and the judgment of the county court is there affirmed, it cannot be assigned for error in this court, that the circuit court should have dismissed the writ of error prosecuted from the county court.

2. In a suit against a surety, the principal is not a competent witness, unless released from the payment of costs.
3. When the borrower, is offered as a witness, to prove usury, he is in the first instance offered to the court with a statement of what he will prove, that the creditor may, if he thinks proper, deny it. When, therefore, the record shows that the borrower was offered as a witness, generally, it must be presumed that he was offered as a witness to the jury, and not to prove the fact of usury specially.
4. The term "award," used in the condition of a writ of error bond, instead of "*judgment*" of the court, is sufficient, the legal effect being the same.
5. When a judgment is affirmed on writ of error, it is error to compute the interest then due on the judgment, and render judgment for the aggregate amount in the appellate court, as that would be compounding the interest.

ERROR to the Circuit Court of Fayette.

The suit was commenced originally before a justice of the peace, founded on a note made by Richards, and one Simeon V. Crump, to the defendant in error. Richards alone was sued, and judgment by default was rendered against him by the justice. He appealed to the county court, and gave bond for the appeal, with James Rice, as security. In the county court there was a judgment against Richards and Rice for $59 44.

Upon the trial, a bill of exceptions was taken, shewing that on the trial, the defendant offered to introduce Crump, as a witness, who was rejected by the court, on the ground that he was the principal in the note sued on, although not a party to the suit; to which rejection of the witness, the defendant excepted.

A writ of error was prosecuted from this judgment, by Richards alone, without joining Rice, to the circuit court of Fayette. The circuit court affirmed the judgment, and rendered judgment against Richards and the sureties in the writ of error bond, for $65 29, the amount of the judgment in the county court, and interest to that time, and five dollars and ninety-four cents damages, besides costs.

From this judgment, the defendants prosecute this writ, and assign for error,

1. The circuit court erred in not dismissing the writ of error.
2. In affirming the judgment of the county court.
3. In rendering judgment with interest to the time of affirmance, in one aggregate sum.
4. In rendering judgment against the sureties in the writ of error bond.

Moody, for plaintiff in error—cited, Minor's Rep. 27, 275, 285, 208; 4 Porter, 421; 1 Ala. Rep. 113, 126, 134, 318, 507; 9 Por. 9, 225; Chitty on Bills, 414; 2 East. 458; 1 Campbell 407; 3 Mass. 37; 7 ib. 47; 10 Johnson, 231; 15 ib. 270; 18 ib. 167; 3 Wendell 415; 10 ib. 93; 2 Phillips, 72; 4 ib. 32.

Cochran, *contra.*

ORMOND, J.—It is very certain that the writ of error from the county to the circuit court, was improperly sued out, being in the name of one only of the parties to the judgment. For this cause, it would have been dismissed if the defect had been brought to the notice of the circuit court. But the plaintiffs in error cannot be heard to make the objection in this court, as that would be permitting them to take advantage of their own wrong.

In Merrell v. Jones, [8 Porter, 554] we held, that where the circuit court had entertained jurisdiction by appeal from the county court, of an *interlocutory* order of that court, that the objection, that the circuit court had no jurisdiction, could be taken in this court, although not raised in the circuit court. That case, however, is entirely unlike the present: there, the court had no jurisdiction over the *subject*, and could not obtain it by the consent of the parties. We are clear in the opinion, that this errror cannot be available to these parties in this court.

2. The suit being against the surety to the note, the principal was responsible to him, not only for the amount of the note and interest, but could also be required to reimburse the surety, the costs which he might be compelled to pay, and was therefore, not a competent witness for the surety, without a release from liability for costs, as was held at the present term of this court in the case of the Bank of Columbus v. Whitehead. No release being executed he was properly excluded, unless under the issue there was some matter which he was competent to testify to, without a release; and it is insisted, that under the general issue in this case, the defendant could have proved usury, without a release from the costs.

The statute which authorises a borrower to prove the defence of usury by his own oath, contains a *proviso*, "that if any person against whom such evidence is offered to be given, will deny upon oath, to be administered in open court, the truth of what such wit-

ness offers to swear against him, then such evidence shall not be admitted." [Aik. Dig. 438, § 8.] It is clear from this statute that when it is proposed to establish usury by the oath of the borrower, the fact which he proposes to prove, must be made known to the court, that the creditor may, if he thinks proper, deny it upon oath, and thus exclude the offered testimony. In practice, the matter to which the borrower is willing to swear, is written down, and submitted to the opposite party, who is then required to elect whether he will deny the truth of the fact offered to be proved, or permit the borrower to be a witness. In the first instance, then, the borrower is not offered as a general witness in the cause to the jury, but is offered to the court, to prove a particular fact, which may never be permitted to go to the jury. In this case, the witness was offered generally, and could not in the attitude he appears in upon the record, have been permitted to prove the fact of usury; we are, therefore, constrained to believe, what was doubtless the fact, that he was offered as a witness to prove the defence contained in the special plea, that the surety was absolved from the payment of the note, by time having been given to the principal debtor by the creditor, and not to prove the fact of usury.

3. The objection to the rendition of judgment against the sureties, in the writ of error bond, is based upon the language of the condition of the bond, which is, "now should the said Green M. Richards and James Rice, his security, well and truly prosecute said writ of error to effect in said circuit court, and well and truly satisfy whatever may be *awarded* against them in said circuit court, &c." The condition of the bond given by the statute is, "that he shall well and truly prosecute the writ of error to effect and pay and satisfy the judgment of the court &c." We are unable to perceive any difference between the legal effect of the bond required by the statute, and that executed in this case. To pay and satisfy the *award* of the court is in effect, to pay and satisfy the *judgment* of the court, and is sufficient, although the precise words of the statute are not copied literally.

In affirming the judgment of the county court, an estimate appears to have been made of the interest which had accrued on the judgment, up to that period, which was added to the judgment of the county court, and a judgment was then rendered for

the aggregate sum; this was improper, and the judgment must be here amended at the cost of the plaintiff in error, by affirming the judgment of the county court, with ten per cent. damages.

DUNKLIN v. WILKINS, ET AL.

1. When the plaintiff, in an action of detinue, makes title to the chattel sued for under a bill of sale, from a former owner, it is not competent for the defendant to show fraud in acquiring this title, if he has no connexion with it.
2. It is otherwise, if he shows he is the agent of the former owner, and detains the chattel by his direction.
3. When a chattel is converted, and the conversion is known to the owner, he cannot by sale, transfer the title to another, so as to enable the latter to sue in his own name.

WRIT of Error to the Circuit Court of Lowndes county.

This action is detinue, for the recovery of certains slaves. On the trial, upon the general issue, the plaintiffs claimed title to the slaves under one Judge, and gave in evidence, a bill of sale from him to them. The defendant then proved that neither the plaintiffs or Judge, ever had the actual possession of the slaves; and offered to prove that the bill of sale was obtained from Judge by the plaintiffs, through fraud and misrepresentation. This evidence was objected to by the plaintiffs, and rejected by the court.

The defendant afterwards, further offered to prove that he held the slaves as agent for Judge, who was in Texas when he made the bill of sale, and who, before the plaintiffs demanded or sued for the slaves, had sent notice to him that the plaintiffs bill of sale was obtained by fraud and required him not to deliver them. He then offered again to show the fraud by evidence; this also was opposed by the plaintiffs, and rejected by the court.

There was evidence tending to prove a conversion of the slaves sued for previous to the acquisition of title by the plaintiffs. On this evidence, the defendant requested the court to instruct the ju-

ry, that should they believe, from the proof, that the defendant had converted the slaves, and that the conversion had taken place within the knowledge of the parties before the plaintiffs purchased, then, this action could not be maintained upon a demand and refusal made subsequent to the purchase. This was refused by the court, and the jury instructed, that under such a state of facts, the plaintiffs could well maintain this action.

The rejection of the evidence and the charge to the jury were excepted to, and a verdict and judgment being rendered for the plaintiffs, are now assigned as error.

Cook, for the plaintiffs in error, cited—Chitty on Contracts, 5 Am. ed. 406; 678, n. 1; Root v. French, 13 Wend. 370, to shew that fraud could be inquired into the more properly, because the defendant was the mere agent of a person defrauded.

As to the error in the charge given, he supposed the decisions in Goodwin v. Lloyd, [8 Porter 237, and Brown v. Lipscomb, 9 Porter 472,] to be conclusive.

Elmore, *contra*—cited Ogbourne v. Ogbourne, [3 Porter 126.]

GOLDTHWAITE, J.—1. The evidence offered, in the first instance, to show that the plaintiffs' title to the slaves was acquired from Judge by fraud, was very properly rejected, because as the case then stood, the defendant was not connected with Judge, and therefore could have no interest in disputing a matter which Judge alone was competent to contest. For any thing then, disclosed, Judge may have acquiesced in the fraud, or subsequently have ratified the contract.

2. But this became a very different question, as soon as it was offered to show that the defendant held the slaves as the agent of Judge, and detained them from the plaintiffs in consequence of instructions from him. We apprehend it is clear that the vendor may defeat the legal sufficiency of his own bill of sale, and show that the contract evidenced by it is void, by reason of fraud.—The case of Root v. French, [13 Wend. 370,] cited by the counsel for the plaintiff in error, is indeed, a direct decision of that very point, and many others could be added. As the vendor may thus contest the validity of a title made by himself, on the ground of fraud, there is no sufficient reason why his bailee, acting under

his instructions, should not be permitted to do so likewise. To hold it to be otherwise, would be, in effect, to declare that the law is incapable of protecting the servant, acting under the authority of his master, to the same extent as the master himself would be protected.

The law is so clear upon the facts disclosed by the bill of exceptions, that we are almost forced to conclude that some mistake has intervened, by which a different question is presented from that intended. If this is so, it will probably be rectified when the case is again tried.

3. The remaining point is the precise one settled in the cases of Goodwin v. Lloyd, [8 Porter, 237,] and Brown v. Lipscomb, [9 Porter, 472.] In both these cases, it was held, that when personal property is converted, the interest of the former owner is changed into a mere *chose in action;* in the case last cited, we say, "If the owner of a personal chattel is not in actual possession, but it is withheld by another, and the owner, ignorant of the fact, under such circumstances parts with his title, it is conceived the purchaser would succeed to his rights; but if the owner is dispossessed by one, *bona fide* claiming title, and the fact of dispossession and *bona fide* claim is known to, or communicated to him, his title is changed into a *chose in action*, which cannot be transferred or conveyed to another." The evidence before the jury may not have warranted the charge requested, but the court assumes the conversion to be within the knowledge of the parties, and informs the jury that under such a state of facts the verdict ought to be for the plaintiffs; thus, in our judgment, running counter to the opinion just quoted.

For rejecting the evidence of fraud, after the connexion between the defendant and Judge was established, and for the erroneous charge, the judgment must be reversed, and the cause remanded.

DEARMAN v. DEARMAN, GUARDIAN, &c.

1. The guardian of an idiot may sue at law, not only for the recovery of a debt, but in any case in which the guardians of infants may maintain a suit.
2. Where a guardian brings an action of trover, alleging that his ward, an infant, was possessed of the property, and lost the same, the declaration should be at the suit of the ward, by his guardian, instead of making the latter the real plaintiff.
3. Where a commission requires a deposition to be taken on a certain day, between the hours of 10 o'clock, A. M. and 4 P. M., and it appears to have been taken on the day designated; the *prima facie* presumption is, that the commission was executed within the appointed hours: and this seems to be the law, although the caption or certificate neither affirm such to be the fact.

WRIT af Error to the Circuit Court of Sumter.

This was an action of trover, for the conversion of a slave, brought by the defendant in error against the plaintiff. The declaration commences as follows: "William Dearman, guardian in idiocy of Jonathan C. Dearman, by attorney, complains, &c."; and counts upon the possession of the ward, and conversion by the defendant previous to the time when he was declared an idiot, and concludes to the damage of the ward. To the declaration the defendant demurred, and his demurrer being overruled, he pleaded *not guilty;* and on an issue upon that plea, the cause was submitted to a jury, who returned a verdict for the plaintiff; on which a judgment has been entered.

A bill of exceptions was sealed at the trial, at the instance of the defendant, which is precisely similar to the bill which was certified in the case of Dearman v. Radcliffe, [at this term,] with the exception, that it appears "the defendant offered to read a deposition for the purpose of establishing by the subscribing witness, a bill of sale which was material to the defence. The plaintiff objected to the admission of the deposition, on the ground, that the notice served on him, recited, that the same would be taken between the hours of 10 A. M. and 4 P. M. on a day designated; when the certificate to the deposition did not show that it had been taken within the hours prescribed, but only that it was

taken on the day and at the place appointed. The objection was sustained, and the deposition excluded.

R. H. Smith, for the plaintiff in error.
John Erwin, for the defendant.

COLLIER, C. J.—The fifty-second section of the act of 1806, "concerning wills and testaments; the settlement of intestate's estates; and the duty of executors, administrators and guardians" enacts, that the guardians of idiots, lunatics, and persons *non compos mentis*, are empowered "to collect, sue for and recover, all just debts due to such idiot, lunatic, or person *non compos mentis*." [Aik. Dig. 221.] The thirty-fourth section of the act of 1819, "to regulate the proceedings in the courts of law and equity in this State," provides, that the guardians of idiots and lunatics, "shall have the same power to all intents, constructions, and purposes, and shall be subject to the same rules, orders, and restrictions, as guardians of orphans are." [Aik. Dig. 250.]

If the first statute is not sufficiently comprehensive, by an equitable construction, to authorise the guardian to maintain an action for any other cause than what is technically a debt, the last enactment is in terms sufficiently broad to entitle him to sue in any case in which the guardians of orphans might bring a suit. This conclusion appears to us so palpably clear as to render unnecessary any argument or illustration upon the point. That an infant might sue by his guardian in a case like the present, has not, nor can be successfully questioned. [See Sutherland v. Goff, 5 Porter's Rep. 508.]

But the demurrer to the declaration should have been sustained upon another ground. The guardian declares in his own name, describing himself as the guardian of the idiot, alleges that the idiot was possessed of the slave, lost her, and that the defendant found and converted her to the damage of the idiot. The fair inference from all this is, that the guardian never had the possession, either actually or by construction; but that the cause of action accrued before his appointment. This being the case, there is not the slightest pretence that he is authorized to sue in his own name. That the form of declaring makes him the real plaintiff, and that the action cannot be thus supported, for the cause stated abundantly appears from repeated decisions of this court.—

[Mason v. McLeod, 5 Porter's Rep. 223; Sutherland v. Goff, ib. 508; Gregg, et al. v. Bethea, 6 ibid. 9.]

In respect to the admissibility of the deposition, it was not necessary that the commissioners shonld have certified *in totidem verbis*, every particular direction contained in the commission. If they certify generally, that they have examined the witness *pursuant* to the commission, it is quite sufficient. [Sanford & Cleaveland v. Spence, at the last term, and Luckie v. Carothers, at this term.] In the present case, neither the commission or certificate are sufficiently recited to enable us to say whether the latter conforms to the decisions cited.

The question is, does the deposition appear to have been taken at the time when the notice to the plaintiff informed him the witness would be examined. That the commission was executed on that day, is not disputed, but the objection is, that it should appear affirmatively, that the examination was made between the hours of 10 *A. M. and* 4 *P. M.* If the certificate of the commissioners is insufficient, for the omission to affirm this fact, it might have been aided by extrinsic proof, that such was the truth of the matter. The case of Waters v. Brown, [3 Marsh. Rep. 558,] is explicit upon this point. But we think, to have authorized the admission of the deposition, no auxiliary proof was necessary. The reasonable inference is, that the commission was executed within the hours in which such business is transacted. If the deposition was taken previously, it would be competent for the party objecting, to show that he attended within the proper time, or would have attended, but for the premature examination of the witness; if after, he might show, that he would have been present within the hours designated in the notice. And to establish these facts, we should be much inclined to admit the oath of the party objecting.

If the certificate of the commissioners or caption of the deposition affirms the fact, that the witness came before them *in pursuance* of the commission, &c., or employs other equivalent terms, and the commission conforms in its special requirements to the notice, the conclusion would be, that the witness was examined within the proper hours of the day. And even in the absence of such a special commission and certificate or caption, it would be *prima facie* admissible.

The other objections arising upon the bill of exceptions, are ful-

ly considered and expressly decided in the case of Dearman v. Radcliffe, [at this term,] to have been well taken. Our conclusion consequently is, that the judgment of the circuit court is reversed, and the cause remanded.

REID, ET AL. v. DUNKLIN.

1. A judgment rendered for a larger sum than is found due by the jury, on a special verdict, cannot be supported.
2. Upon a failure to return an execution, the sheriff becomes liable for the amount of the judgment.

ERROR to the Circuit Court of Montgomery.

CAMPBELL, for the plaintiff in error.
MAYS, *contra.*

ORMOND, J.—The principal question in the cause, whether the sheriff is liable for the amount of the judgment upon a failure to return an execution, has been decided against the plaintiff in error, in the case of Crawford v. Chandler, at the present term, and in many previous cases. We are reluctantly compelled, from a sense of duty, to tread in the path of our predecessors, until the Legislature shall think proper to apply the necessary corrective.

The remaining assignments of error, present the question whether the execution described in the special verdict corresponds with the one on which the notice is made. It is well settled that a special verdict cannot be aided by intendment; there must therefore, if not a literal, be at least a substantial correspondence between the facts found by the verdict, and those on which the motion is predicated.

The first variance between them is, that in the motion, the execution is stated to have issued on the 15th of April, and in the verdict, is found to have issued on the 30th April. We think,

however, that as the time of the issuance of the execution was immaterial, the variance may be disregarded; but in describing the amount for which the execution issued, it is found by the jury, to be six hundred and sixty-six dollars, whilst in the motion it is stated to be six hundred and sixty-six dollars *ninety cents*. Again the jury find that the amount due on the execution is six hundred and sixty-six dollars and ninety cents, besides the costs, and a judgment is rendered for the amount, with interest from the 2d March, 1840.

If the variance between the amount of the judgment, as set out in the motion, and that found by the verdict, could be surmounted, it would be impossible to support a judgment rendered for a larger amount than is found to be due by the jury. It is not aided, as supposed by the counsel, by the maxim, that that is certain which may be rendered certain, if indeed the maxim applied to such a case as this, because the finding of the jury is not of the amount for which the execution issued; that had been previously found by them, but it was *of the amount due* on the execution; and the judgment being for a larger sum than thus found due, cannot be supported.

The judgment must therefore be reversed, and the cause remanded.

BRAZEAL, AND OTHERS, v. SMITH.

1. A notice to a sheriff that a motion will be made against him and his sureties, for failing to pay over a sum of money collected upon an execution, is sufficient when it identifies the execution with certainty, and states the time when it issued and was placed in the sheriffs hands for collection; the receipt of the money upon it previous to its return day; that the money was demanded by competent authority, and refused, with the time when the demand was made; and also informs the sheriff that a motion will be made against him and his sureties, on a certain day or term of the court, for the sum so refused to be paid, with the damages allowed by statute.
2. In a motion against the sheriff and his sureties, when he is served with notice,

the bond is in no way essential, yet it may be introduced in evidence, to show he was in office, when he received the money, and when competent, as evidence, may be established by the certificate of the clerk of the court, in whose custody it is placed by law.

3. Under the statute which requires that the appointment of an agent shall be indorsed on the execution, when the plaintiff does not reside in the county to which it goes, or shall be made in writing, the sheriff may refuse to pay until such evidence is furnished him, but he waives this either by paying a part of the money, or in any other manner, recognizing the agency.
4. The sheriff is not competent to determine that one execution shall be set-off against another when he has one in favor of, and another against the same person.
5. Where the active interest in an execution has been assigned by the plaintiff, his assignee is authorised to use the name of his assignor in a rule against the sheriff and his sureties.

WRIT of Error to the Circuit Court of Blount county.

Motion against Brazeal, as the sheriff of Blount county, and his sureties for failing to pay over money collected upon an execution.

The notice that the motion would be made, was given to Brazeal only. It recites that judgment was obtained in the circuit court of Blount county, at the September term, 1839, by the plaintiff, against William and Anderson White, for six hundred and seventy-six 75-100 dollars, besides costs, that upon this judgment a writ of *fi. fa.* issued from the said court on the 25th May, 1840, and was placed in Brazeal's hands to execute, he then being sheriff, &c.; that on the 5th of June, of the same year, the said *fi. fa.* being in full force and effect, Brazeal as sheriff as aforesaid, received the amount of the said *fi. fa.* That the money was duly demanded of Brazeal on the 17th day of March, 1841, by William S. Mudd, attorney for the plaintiff, and $426 00 was paid, but Brazeal then neglected and refused to pay the remainder of the sum so collected; and has hitherto neglected and refused to pay, &c. It then proceeds to inform him that a motion will be made against him and his sureties (who are named,) at the March term of said court, for the year 1842, for the sum so collected and refused to be paid over, as well as for damages on it, at the rate of five per cent. per month from the time of the demand. The notice is dated March, 1842, and was served the 21st of that month.

The defendants appeared and joined issue, denying all the allegations of the notice.

The judgment entry recites all the material facts asserted in the notice, and that they were proved by the plaintiff. It also recites that the issue was tried by a jury, who found it for the plaintiff, and that Brazeal, whilst sheriff as aforesaid, did make and receive the sum of two hundred and fifty 75-100 dollars on said execution, which he did not pay over when the same was demanded as aforesaid: whereupon, the court gave judgment against the sheriff and his surviving sureties, for that sum, as well as one hundred and fifty dollars damages, at the rate of five per cent. per month, from the 17th March, 1841, until the time when judgment was rendered.

The defendants moved the court to quash the proceedings, on the ground that the notice was insufficient; but the motion was refused.

The plaintiff offered in evidence the official bond of the sheriff, purporting to be executed by him and the other defendants, as his sureties. It purported to be approved on the 11th of May, 1839, by the judge of the county court, and upon it was this memorandum: "The State of Alabama, Blount county, s. s. The foregoing bond was filed in my office for record, the 11th day of May, 1839, and was duly recorded on the 10th day of January 1840, in deeds book C. page 323. Test, John P. Thomas, clerk, by his deputy, Thomas B. Shearer."

The defendants objected to this as evidence, unless some other proof of its execution and validity was given. The court however admitted it.

The attorney mentioned in the notice, testified that he as the attorney of the plaintiff, had demanded the money from the sheriff. The defendant insisted the record showed that another person was the attorney of record. The court, upon this evidence, instructed the jury that this demand was a sufficient one.

It was admitted that the plaintiff named in the caption of the motion, had by a legal assignment, transferred all his interest in the judgment to one Banks; and also, that the sheriff, when the money was demanded from him, had in his hands, for collection, another *fi. fa.* in favor of one Truss, against the plaintiff, for a larger sum than that moved for. Upon these admissions, defendants asked the court to instruct the jury,

1. That the present plaintiff having transferred all his interest to Banks, could not sustain this motion.

2. That the sheriff was authorised to retain the money in payment of the execution in favor of Truss.

These instructions were refused.

The defendants having excepted to the ruling of the court in these several matters, now assign them as error.

BAYLOR, for the plaintiff in error.

COCHRAN, *contra.*

Per Curiam.—1. Our opinion is, that the notice is amply sufficient to enable the plaintiff to sustain the motion. It identifies the execution with certainty; the time when it was issued and placed in the sheriff's hands for collection; the receipt of the money upon it, previous to its return day, or its actual return; that the money was demanded by competent authority, and its payment refused, as well as the time when the demand was made. This, in addition to the information, that the motion would be made on a certain day, or term of the court, against the sheriff and his sureties, for the sum so refused, or neglected to be paid, with the damages allowed by the statute, is all that is necessary.

2. In the case of McClure v. Colclough, at this term, we held that when the proceeding is against the sheriff as well as his sureties, he alone is competent to litigate the questions involving his liability, and that all those between the plaintiff and the sureties, are thereby concluded, except the *factum* of the bond and its legal effect. It follows from this, that upon an issue, *to which the sheriff alone is a party*, that the bond is no wise essential, unless it may be necessary as evidence, to show the time when the sheriff was duly qualified to act as such; and it is very obvious that the cases must be rare in which it will be necessary to resort to such evidence, as any action by the sheriff, in his official capacity, could be more easily proved by other modes. Still we can not say, in the present case, that one of the questions before the jury might not have been whether Brazeal actually was the sheriff when he received this money, and to show that he was, his official bond would be competent evidence. We shall therefore enquire, whether the paper offered in evidence, was suffi-

ciently established, by what appeared upon it, to do away the necessity for further proof of its execution and validity.

The statute requires such bonds as these, to be recorded in the office of the clerk of the county court, of the proper county, and directs that the record of any such bond so recorded, may be proceeded on in the same manner as the original, under the certificate of the clerk, of its being a true copy, unless the court before whom any proceeding may be had, shall deem it necessary, for the purposes of justice to require the original. [Digest 101, § 16.] It is evident from this, that the bond of a sheriff is a public paper, which may be exemplified under the certificate of the proper officer, and the copy proceeded on in the same manner as the original. The direction that the record of the bond may be proceeded upon must be considered as indicating the intention that the exemplified copy shall have the same effect in every way as the original, unless the court shall require that to be produced. We can perceive no reason why it is not equally good as evidence as the original, even when a collateral fact is to be proved. As the statute thus makes a copy of the record evidence, it is clear that the same effect must be given to the bond itself, which is in reality the record. Of course, in no other county than that where the bond is filed could a question like this arise, for the clerk is not authorised to permit the original bond to be taken from his office, except by some order of court, but here the suit was in the same county, and probably the record was in the same building where the court was sitting. We think this exception unavailable.

3. With respect to the demand as having been made by a different attorney from the one of record, it is insisted, that under the statute, the appointment of the agent should either have been indorsed on the execution or made in writing. The statute referred to, [Digest, 174 § 75] is an enactment for the benefit and relief of sheriffs where the plaintiff is a *non resident of the county.* The proof here is silent as to the evidence, therefore the question is not raised upon the record; but if it was, the facts would seem to authorise the inference that the sheriff himself was satisfied with the evidence of agency. Such being the case, he ought not to be permitted to defend a motion on the ground that the appointment of the agent making the demand, was not in writing, when he had dealt with him as authorised, either by paying a

part, or in any other manner recognizing the agency. [Braley v. Stout, Ingoldby & Co. MSS. June T. 1842.]

4. The sheriff is not the proper authority to judge whether one execution can be set-off against another, or whether a sum collected in one suit shall be appropriated to the satisfaction of another. How far such an appropriation, before notice of any conflicting interest in another would create, or relieve the officer from liability, need not now be examined, as there is nothing to show that such an appropriation was made.

5. The fact that the entire interest in the execution had been assigned by the plaintiff to another, is no defence to this motion. As we have no statute prescribing a mode by which the assignee of a judgment may become a party to the record, it would seem to follow that every proceeding subsequent to the judgment, must be carried on in the name of the party, although the beneficial interest in the recovery is transferred to another.

Our conclusion on the whole case is, that the judgment must be affirmed.

OLIVER v. HUTTO, USE, &C.

1. Where a writ is sued out against two joint makers of a promissory note, and served on one only, but the declaration is against both, it is not necessary to enter a discontinuance on the record, as to the party not served with process; if no judgment is rendered against him, this is in legal effect, a discontinuance, and the judgment against the defendant before the court, will be regular.

WRIT of Error to the Circuit Court of Pike.

This was an action of *assumpsit*, on a promissory note, at the suit of the defendant in error, against the plaintiff and one Wilkinson. The writ was executed on the former, and returned 'not found,' as to the latter; the declaration pursues the writ without noticing the defect of service thereof; and the judgment

is rendered against the plaintiff alone, without expressly discontinuing the suit as to Wilkinson.

Buford, for the plaintiff in error.—As to the party not served with process, the action should have been discontinued; and the failure to do this is fatal to the judgment.

No counsel appeared for the defendant.

COLLIER, C. J.—The second section of the act of 1818, "for the better regulation of judicial proceedings," enacts, whenever a writ shall issue against any two or more joint, or joint and several obligors, or drawers, &c. of any such bond, promissory note, &c., it shall be lawful for the plaintiff, at any time after the return of the writ, to discontinue such action against any one or more of the defendants on whom the writ shall not have been executed, and proceed to judgment against any one or more of the defendants on whom the writ shall have been executed, &c.—[Aik. Dig. 267.] The question raised upon this statute is, whether it should be shown by the record that the plaintiff did, in express terms discontinue his suit as to the defendant not served with process. In Williams, et al. v. Lewis, [2 Stew't Rep. 41,] it was said that a discontinuance should be thus shown. And in McRae & McMillian v. Foster, [2 Stew't & Porter's Rep. 143,] it was considered sufficient for the plaintiff to state in his declaration that he discontinues as to the defendant upon whom the writ has not been executed. So, in Wheeler, et al. v. Bullard, [6 Porter's Rep. 352,] the court held, that leave granted to discontinue would operate a discontinuance as to the defendant not before the court, though no formal judgment was entered. [See also, Smith v. Blakeney, 8 Porter's Rep. 128.]

In neither of the cases cited but the first, does the court undertake to say, that the plaintiff should cause the discontinuance to be entered upon the record; and there the remark seems to have been made without much consideration, after it had been determined to reverse the judgment upon another ground. We shall not therefore feel ourselves bound by that decision, but shall treat the question as entirely open. The more reasonable rule in our opinion seems to be, not to require a discontinuance, either by a recital in the declaration, or an entry of record, but to consider the judgment as sufficient where such will be its legal effect. In

the present case, the judgment against the defendant served with process, so operates as to put an end to the suit. It is a practical discontinuance as to the party not served, and as to him the action cannot be reinstated without his consent.

But if this view were erroneous, it might be asked how the plaintiff in error has been prejudiced by the failure to discontinue the action as to the party sued with him. He is precisely in the same predicament as he would have been if the most formal entry had been made, and it may well be questioned, if he can allege an irregularity that does not affect him. Be this as it may, the judgment must be affirmed.

CONKLIN v. HARRIS.

1. In a suit commenced by attachment, where the defendant is a *non resident*, it is not necessary to state in the *affidavit* that the ordinary process of the law can not be served on him.
2. Objections to the sufficiency of the bond in an attachment, must be taken in the court below, that the party may have an opportunity to execute a sufficient bond.
3. Objection cannot be made in this court, that the plea was *non assumpsit* instead of *nil debet*.
4. The effects of a *non resident* partner may be attached, although there is one of the firm resident in the State.
5. An assignee may maintain an action of debt in his own name, without alledging a promise from the maker.

ERROR to the County Court of Perry.

This proceeding was commenced in the court below by the defendant in error, by original attachment, as endorsee of a note made by Conklin & Moore to White & Richards.

The affidavit recites that the defendant is a non-resident, but does not state that *the ordinary process of law cannot be served on the defendant.*

The bond is in the usual form, except that it omits to state against whom the attachment is sued out.

The plaintiff having declared in debt, the defendant appeared, by his attorney, and moved the court to quash the attachment; which the court refused, and thereupon the defendant pleaded,

1. *Non assumpsit*, and two special pleas.

2. *Actio non*, &c. because he says that at the time of suing out the attachment in this case, and from thence hitherto, John M. Moore, one of the co-partners of the firm of Conklin & Moore, the makers of the promissory note in the plaintiff's declaration mentioned, was and still is a resident citizen of the State of Alabama, to-wit, a citizen of the county of Talladega, and liable to the ordinary process of the law; and this defendant is ready to verify: wherefore, he prays judgment if the plaintiff ought to have or maintain his aforesaid action, &c.

The third plea is to the same effect.

Issue was taken on the first plea, and a demurrer filed to the second and third.

Hugh Davis, a garnishee, filed his answer, whereupon the court, on motion, ordered that the garnishee be restrained from paying over said money until the further order of the court.

The court overruled the demurrers to the second and third pleas, and the jury having found the issue on the first plea, for the plaintiff, judgment was rendered against the defendant.

Pending the trial a bill of exceptions was taken, from which it appears that the plaintiff offered in evidence, and read to the jury, a promissory note to the following effect:

New-York, 22 *Sept.* 1836.

Six months after date, we the subscribers, of Gainesville, Ala., promise to pay to the order of Messrs. White & Richards, one hundred and ninety-seven dollars eighty-one cents, at the Branch of the Bank of the State of Alabama, at Mobile, Alabama, value received.

Conklin & Moore.

And also read the endorsements on the same, as set out in the plaintiff's declaration, which being all the evidence in the cause, the defendant moved the court to charge the jury, that the note, without further proof, was not sufficient to sustain the plaintiff's cause of action, but the court charged the reverse to be the law,

and that the note was sufficient to authorize a verdict without further proof. To which the plaintiff excepted.

The assignments of error are,

1. The refusal of the court to quash the attachment, for the insufficiency of the affidavit and bond.

2. The judgment was rendered on a verdict found on an immaterial issue.

3. The judgment on the demurrer to the special pleas.

4. That the declaration was defective, and was reached by the demurrer.

5. The matter of the bill of exceptions.

DAVIS, for plaintiff in error, cited Aik. Dig. 39; Minor's Rep. 196; 1 Porter, 15; 3 ib. 226; 8 ib. 445; 9 ib. 196, 446, 456, 493; 1 Ala. Rep. N. S., 129, 182.

ALEX. GRAHAM, *contra*, cited 6 Porter, 365; 1 Ala. N. S. 134, 235; 7 Porter, 483, 486; 9 ib. 320; 2 Ala. N. S. 326; 3 ib. 250; 1 ib. 592; 2 Stewart, 410; 3 ib. 480, 192; 6 Porter, 352; Minor, 252.

ORMOND, J.—If it were admitted that a writ of error can be prosecuted to a judgment of the court below, refusing to quash an attachment, we are of opinion there was no error in this case. The supposed error was the omission to state "that the ordinary process of law could not be served on the defendant. This is not necessary where the defendant is a *non resident.*

The objection to the bond is for the first time taken in this court, and although the bond is certainly defective, advantage could only be taken of it in the court below, as was held in Jackson v. Stanley, [2 Ala. 326,] where an opportunity would be afforded of substituting a perfect bond.

No objection can be taken in this court, because the issue was upon the plea of *non assumpsit* instead of *nil debet;* it was an issue tendered by the plaintiff in error himself, and cannot now be objected to by him. It was, moreover, a substantial denial and traverse of the facts alleged in the declaration, the form of which was waived by the defendant in error taking issue upon it.

There was no error in the judgment of the court on the demurrers to the special pleas. The facts relied on in the pleas to bar

the action, are, that the makers of the note were partners, and that one of them was a resident of the State, and subject to the ordinary process of the law. A debt due from co-partners is the several debt of each, and each may be sued separately. The proceeding by attachment is merely a mode of compelling an appearance, and is to all intents a suit, as much so as if commenced by writ. This was expressly decided in Greene v. Pyne, [1 Ala. Rep. 235,] when it was held, that an attachment might be sued out against one of several partners, without joining the others.

In Winston v. Ewing, [1 Ala. 129,] it was held that a debt due the partnership could not be attached by process at law, to pay the *separate debt* of a partner; but that does not appear to be the case here, nor is such alleged to be the fact in the plea, but on the contrary, so far as we can judge from the answer of the garnishee and the form of the note, it is an attempt to subject the partnership property to the payment of a partnership debt.

We can see no reason for refusing the remedy by attachment, to a creditor, because one of the partners resides within the State, and may be sued in the ordinary mode. The statute expressly gives the right to sue each partner separately, and in fact makes the partnership debt the separate debt of each. It results necessarily from this that whenever the *affidavit*, which the statute requires to authorize the suit to be commenced by attachment, can be made, as either partner could be sued in the ordinary mode, so may either be sued by original attachment.

In addition to these objections, the pleas we have been commenting on should have been pleaded in abatement, as they do not deny the plaintiffs the right to recover the debt, but merely question the right to maintain an action in this particular mode.

It is supposed, however, that the declaration is defective, and that although the pleas may be bad, as the declaration is bad also, the demurrer will reach that defect. The supposed error in the declaration is, in not alledging a promise from the makers to pay the endorsers. This was not necessary in debt, as the statute gives the assignee the same rights against the maker as the payee would have had. [Aik. Dig. 330.] Certainly the payee could have maintained debt without alledging any promise to pay other than that contained in the note. Even if the action had been assumpsit, the objection could not have been reached by general demurrer, and special demurrers are abolished by statute.

It was not necessary for the plaintiff to prove any fact under the issue in this case, beyond the production of the note sued on, and the indorsements, to entitle him to recover. As the making of the note and indorsements were not denied by plea, they were proved by the note itself, under the influence of our statute.

Let the judgment be affirmed.

CAPERTON v. MARTIN.

1. The lien of an execution creditor upon the personal estate of his debtor, when it has once attached, by the execution coming into the hands of the proper officer, is not divested, as between the debtor and his personal representatives and the creditor, by the taking and forfeiture of a forthcoming bond; but the execution issued thereon against the principal and surety, continues the lien of the first execution, although it is issued after the death of the principal obligor.
2. A coroner is not bound to notice the insolvency of a debtor's estate against which he has an execution; nor does the death of a debtor, whose estate is reported insolvent, destroy the lien of an execution when it has once attached upon his property.

WRIT of Error to the the Circuit Court of Jackson county.

Trover, by the plaintiff, as the administrator of Henry Norwood. At the trial, he proved property in the slaves in his intestate, and their sale by the defendant.

The defendant justified the sale under four executions, directed to him as coroner, under which he seized and sold the slaves. The executions were different in amount, but are all governed by the same principles, so that a statement of the facts connected with one, will be sufficient to show what questions were involved. Judgment 29th October, 1839; *fi. fa.* dated and issued 27th November, same year; received by the coroner 12th February, 1840, and returned the 15th April of the same year without any levy. An *alias fi. fa.* dated and issued the 24th April, 1840, was received by the coroner on the 28th of the same month, and on

the 23d of June, 1840, was levied on six slaves, which were replevied by a delivery bond to deliver them on the 1st Monday in July, then next. This bond was returned forfeited, on the 6th of July. A *fi. fa.* on this bond, dated and issued the 30th July, 1840, was received by the coroner on the 3d of August, and levied on the 14th of August of the same year, upon the slaves sued for, of which only two were included in the former levy. It was also in evidence, that Norwood died on the 14th July, 1840: administration was granted to the plaintiff on the 5th August of the same year, and soon afterwards the estate was represented insolvent.

The plaintiff, as administrator, received from the defendant the excess produced by the sale of the slaves, beyond the sums sufficient to satisfy the executions.

On this proof the court instructed the jury, that the executions issued after the death of Norwood, were regularly issued and the coroner was justified in seizing and selling the slaves, by the authority given by them.

The plaintiff excepted, and now assigns this charge as error.

Robinson, for the plaintiff in error, argued,

1. The levy of the first executions and the giving of the delivery bonds, operated as a satisfaction of the judgments; therefore, all the liens created by them were discharged by the levy and bond. [Aik. Dig. 171 § 66; 1 Wash. 20, 2d ib. 551; 7 John. 428; 12 ib. 207; 4 Mass. 402; 1 Wash. 92; 2 ib. 189; 4 Bibb 532; 2 Lord Raym. 1072; 3 Howard, 417; Lusk v. Ramsay, 3 Mum. 417; ib. 308.]

2. Immediately upon the grant of administration to the plaintiff, he became invested with the title to the personal estate, of his intestate and the executions issued on the forfeited bonds after Norwood's death, were irregular and void, and therefore afford no protection to the defendant. [12 Mass. 309; 4 S. & P. 249, 250; 1 Salk. 319; Woodcock v. Bennett, 1 Cow. 711; Pearce v. Hubbard, 10 John. 416; Loop v. Bentley, 5 Wend. 276; 2 Conn. 702; 10 Wend. 206; 2 Saund. 27, note 11; ib. 223; 1 Lord Raym. 245; 2 ib. 768.]

3. The executions issued on the bonds, can have no relation back to the day of their forfeiture, so as to create a lien. [Dig. 278, § 114; 165, § 36; 2 Binn. 174; 8 John. 348; 16 John 287; 17 John. 116; 4 Bibb, 532.]

4. The estate was shown to be insolvent, and whenever such a case exists the lien is gone, because the statute declares all creditors shall be paid *pro rata*. [Digest 151, § 2; Royall's adm'r v. Johnson, 1 Rand. 421; ib. 438; ib. 478; Hale v. Cummings, 3 Ala. Rep. N. S. 398.

McClung, *contra*—insisted,

1. That the execution on the bond is neither void nor voidable because the duty is imposed on the clerk, and he is compelled to act under a penalty. [Digest 171, § 66.]

2. The lien once acquired by an execution, becomes specific and must continue. The statute just cited, shews, that the intention of the legislature that the second execution should be a mere continuation of the first, with the additional security of the securities to the bond. This intention is further evinced by another statute, which requires executions issued after one returned in vacation, to be tested of the return day of the previous execution. [Digest 163, § 21.]

3. If the defendant die within the year and the day, execution may issue after, provided it can be tested, according to the practice of the court, before his death. [10 Wend. 211; 1 Arch. Prac. 282; 2 ib 90; 7 Term 20; 6 ib. 368.] So in the present case, if the last execution, had actually issued before the death, the goods would have been bound, although the coroner did not receive the execution until after, If an execution can be tested back there is no reason why the same effect should not be given to it without such an evasion. That an execution may bind the goods in the hands of the administrator, though issued after the death, is shown by the Digest, [160 § 5,] where such a course is authorised when the defendant dies in custody charged in execution.

4. The effect of a forthcoming bond in this State, and a delivery bond, in Virginia, is essentially different. There, a new judgment is rendered on the bond, but here, the execution goes on the return, and seems to be a mere continuation and extension of the previous process. A mere levy which is unproductive does not discharge a lien, as in the case of property levied on and claimed by another. [2 S. & P. 278.]

5. As to the lien being discharged by the insolvency of the estate, this question cannot arise, because in a suit at law, the necessary facts cannot be ascertained. The proposition however

is denied, because the levy is a specific appropriation of the defendant's property for the payment of the debt.

GOLDTHWAITE, J.—1. We held in the case of Hopkins v. Land, [4 Ala. Rep. N. S. 427] that a forthcoming bond was neither a satisfaction nor a discharge of the judgment, but that the plaintiff might elect after the forfeiture of such a bond, to proceed upon it, or sue out an *alias* execution. And in Campbell v. Spence, [4 Ala. Rep. N. S. 543,] we considered, that the taking of such a bond was not a discharge of the liens acquired by a judgment. These decisions, when connected with the principle settled in Collingsworth v. Horn, [4 S. & P. 237,] are conclusive of all but one of the questions raised here.

In Collingsworth v. Horn, the facts were precisely similar to those now before us, except that here, there was a partial levy; and the subsequent execution is not in terms, an *alias*, inasmuch as it issues on a forthcoming bond. The question then is, whether these circumstances make such a distinction between the cases as to render the execution inoperative. In our opinion, they do not. Under the principle settled in Collingsworth v. Horn, the plaintiff, if no levy whatever had been made, could have sued out an *alias* execution, and then the lien of the original execution would have been continued. Or, under the principle settled in Hopkins v. Land, he might have abandoned his rights under the bond, and have sued out an *alias* execution. In either case, the right of the plaintiff would have been preferred to that of the administrator.

It certainly is a novel proposition that a matter evidently intended to furnish an additional security to the creditor, should be so construed as to work him an injury; and yet, such would be the case here, upon the insolvency of the surety on the bond, if the law is, as supposed to be by the counsel for the plaintiff in error. Conceding, however, that the surety is solvent, there is no reason why the creditor should be forced to pursue him, when there are effects of the principal debtor, bound by the previous lien of the execution. As the creditor could have sued out an *alias* execution, which would have the effect to continue the lien, even if no levy whatever had been made, we think the law gives the same effect as between the debtor or his personal representative and the creditor, to that subsequently sued out on the forthcoming bond.

2, It appears that Norwood's estate was represented as insolvent by his administrator, previous to the levy; but the coroner was not bound to take notice of that fact, even if it would have the effect to divest the lien of the execution. My own opinion is, that the statute respecting insolvent estates, [Digest 151, § 2,] was intended to provide for the *pro rata* division of all the effects between the creditors, and that all inchoate or imperfect liens, arising merely by operation of law, are destroyed by it; and such was considered to be its effect upon a lien created by an attachment. [Hale v. Cummings, 3 Ala. Rep. N. S. 398.] But on this point, the majority of the court think otherwise, and hold that where execution upon a judgment is begun, the lien upon the personal estate is fixed and absolute, and is not destroyed by the subsequent death and insolvency of the defendant. They distinguish this from an attachment, as there the plaintiff has no right to subject the property attached, to sale, until a judgment is obtained, and this being prevented by the statute the lien is at an end.

Our conclusion is, that there is no error in the record, and the judgment is affirmed.

YARBOROUGH'S EX'R v. SCOTT'S EX'R.

1. A *fieri facias* was issued against the property of H Y, C B M and others, and levied on certain slaves as the property of the former; to which D Y interposed a claim and gave bond to try the right, pursuant to the statute. On the trial, the plaintiff in execution offered as a witness, C B M, to prove that the slaves in question were the property of H Y: *Held*, that he was interested in subjecting them to the satisfaction of the execution, and therefore an incompetent witness.
2. Where a judgment against an executor or administrator is rendered *de bonis propriis*, when it should be *de bonis testatoris* or *intestatis*, it will be treated as a clerical misprision, amendable on motion, or on error, at the costs of the plaintiff in error.

Writ of Error to the Circuit Court of Perry.

The testator of the defendants in error recovered a judgment in the Circuit court of Perry against Charles B. McKinney, Walter A. Parrish and Henry Yarborough, as partners trading under the style of McKinney, Parrish & Co., and Wilson McKinney and Charles B. McKinney, partners trading under the style of W. & C. B. McKinney, for the sum of two thousand two hundred and seventeen dollars, besides costs. An execution was issued on this judgment on the 26th September, 1840, and levied on sundry slaves, to which David Yarborough made affidavit of title, and executed bond with surety, with a view to the trial of the right of property, as required by the statute. Pending the case thus made in the Circuit court, the claimant died, and the plaintiff in error was made a party in his stead; and the plaintiff in execution having also died, the defendants were substituted as parties.

An issue was made up, and submitted to a jury for the trial of the right of property. Pending the trial, the claimant's executor excepted to the ruling of the Judge. It was proved, that the slaves levied on by the execution, were seised as the private and individual property of Henry Yarborough, and the plaintiff offered Charles B. McKinney, one of the defendants in execution, to show, that the slaves belonged to Henry Yarborough. The claimant objected to the competency of this witness, but his objection was overruled, and the witness allowed, by the court, to give evidence; thereupon, the claimant excepted, &c.

The jury found the slaves subject to the execution, on which a judgment of condemnation was rendered; and that the claimant's executor pay the costs.

Davis, for the plaintiff in error.—McKinney was not a competent witness for the plaintiff in execution. If he was, the judgment is irregular in being rendered against an executor (who came in pending the cause) *de bonis propriis.*

No counsel appeared for the defendants.

COLLIER, C. J.—The admissibility of one of the defendants in execution to give evidence against the claimant, depends upon the question, whether it was his interest to condemn the property. It has been decided, and may be regarded as settled law, that where the claimant, in a case like the present, deduces a title to

the property through the defendant in execution, the latter is, in general, a competent witness for either party, on the ground that his interest is balanced. If the plaintiff fails in obtaining satisfaction of his execution, the defendant still remains liable to its payment; and if the property is wrested from the claimant by a judgment of condemnation, he is liable to the latter upon his warranty of title, which is implied in every sale of personal chattels.

But in the case before us, it does not appear that the defendant who testified against the claimant, was in any manner responsible to the latter, if unsuccessful, or that a title was attempted to be deduced through him or either of the other defendants in execution; while on the other hand the condemnation of the property, and its appropriation would *pro tanto*, relieve him from the satisfaction of the execution. The witness was competent to give evidence for the claimant; because, by supporting the claim, the execution would continue operative to the full amount. Thus we see that he had a direct interest in producing a result favorable to the party who offered him, and according to a settled rule, was improperly received. The cases are numerous to show, that a witness may testify against his interest, or where his interest is balanced, but his evidence shall be excluded where he is interested to favor the party calling him. [See them collected in 2 Phil. Ev. note 80 and 81, C. & H's ed.]

It has been repeatedly decided by this and other courts, that where a judgment against an executor or administrator is rendered *de bonis propriis*, instead of *de bonis testatoris* or *intestatis*, it will be regarded as a clerical misprision, amendable on motion. And under the act of 1824, the judgment would be amended at the costs of the plaintiff in error, if we were not compelled to reverse it upon the first question examined.

Let the judgment be reversed, and the cause remanded.

SAUNDERS v. HENDRIX.

1. A receipt acknowledging the payment of money, is open to explanation by parol proof, showing that the money, either from mistake, misrepresentation, or from some other cause, was not in fact paid.
2. An acknowledgment in the body of a deed, that the consideration money was paid, is considered as a receipt for money merely, and open to explanation by parol proof as any other receipt for money.
3. When a receipt on the back of a note is so unintelligible, that it is doubtful whether it acknowledged the payment of one hundred or one thousand dollars, it is void for uncertainty, and parol proof is admissible to show the sum actually paid.
4. The widow of a co-maker of a promissory note is a competent witness in a suit by the payee against the other joint maker, to prove that a payment endorsed on a note, was one hundred and not one thousand dollars; and it will make no difference that an entry, suggesting the death of her husband, had not been made in the cause, at the time her deposition was taken.

ERROR to the Circuit Court of Tuskaloosa.

This was an action commenced by the defendant in error, against the plaintiff in error, and one Obadiah Mayfield, as joint makers of two promissory notes, for thirteen hundred and twenty dollars, each. Mayfield having died, the suit was abated as to him.

Pending the trial, a bill of exceptions was taken by the plaintiff in error, by which it appears that the plaintiff produced and read in evidence, the notes declared on. Upon the notes were sundry credits, one of which, was contended by the plaintiff to be but one hundred dollars, whilst the defendant insisted that it was one thousand dollars. The plaintiff to explain the credit in dispute, offered the deposition of Mrs. Mayfield, widow of Obadiah Mayfield, one of the makers of the notes, to which the defendant objected, but the objection was overruled by the court, and the deposition admitted, to which the defendant excepted.

The plaintiff also introduced one White, who swore that he was at the house of Obadiah Mayfield some time in the month of May, 184–; that Mayfield told him that plaintiff had come there expecting to get a thousand dollars, and had got only one hun-

dred, which testimony was objected to by the defendant, but admitted by the court, and the defendant excepted.

The plaintiff also read to the jury, the deposition of H. C. S. Hendrix, the trustee in a deed of trust executed by Saunders and Mayfield, to secure the payment of the notes sued on, which was given in payment of the purchase money of the land conveyed by the deed. That he sold the land as trustee; that on the next day when he was about to make a title to the land, a controversy arose between the plaintiff and defendant, about a credit on one of the notes, the former contending that it was but one hundred, and the latter insisting that it was a thousand dollars. Witness asked Saunders, if he paid a hundred or a thousand dollars, the latter replied the note would show for itself, and made the same answer again to the same question. but finally said he had paid a thousand dollars. That at the sale, the defendant became the purchaser, but only paid ten dollars.

It was in proof, that the ambiguous credit was in the hand writing of the defendant.

The plaintiff also proved by the county clerk, that plaintiff, defendant, and Hendrix, the trustee, came to his office and delivered to him a deed, executed to the defendant by the trustee, to be recorded, after which the parties sat down to calculate the balance on the notes. That a dispute soon arose about a credit on one of the notes, whether it was one hundred or one thousand dollars; that the parties became excited and left his office; that soon after the plaintiff returned, and demanded the deed, but the defendant not being present, witness refused to deliver it.

The defendant then offered and read in evidence, a deed made by the trustee to the defendant, he having sold the land to him by virtue of the power in the deed, by which he acknowledged to have received from the defendant, the sum of sixteen hundred dollars, and moved the court to charge the jury that the deed of the trustee was evidence of its contents, and that the consideration stated in it was paid, and could not be disputed; which charge the court refused to give, and stated to the jury that they had nothing to do with the question arising on the deed, and that the same was withdrawn from their consideration.

To the refusal to charge, and to the charge as given, the defendants excepted.

The court having rendered a judgment for the plaintiff upon

the verdict of the jury, the defendant prosecutes this writ, and assigns for error, the matter set forth in the bill of exceptions.

B. F. Porter, for the plaintiff in error.
Peck & Clark, *contra.*

ORMOND, J.—The questions presented on the bill of exceptions for our consideration, are,

1. Whether the parol testimony offered in reference to the indorsement of payment on the note was properly received. The general doctrine in reference to a receipt, acknowledging the payment of money, is, that it is an admission, which although *prima facie* evidence against the party making it, is open to explanation by him, as that it was made by mistake or misrepresentation.

In this case, it appears that either from accident or design, a writing on the back of one of the notes, was so unintelligible that it was impossible, with certainty, to say whether it was designed as a receipt for one hundred, or for a thousand dollars. The defendant below, who wrote the receipt, insisting that it acknowledged the payment of the latter sum, whilst the plaintiff maintained it was the former. If then, the receipt was so uncertain that it was impossible to say whether it was designed for the one sum or the other, it was void for uncertainty, and parol evidence was admissible to prove the payment actually made, so that in either aspect of the case, the parol evidence was properly admitted. [Ensign v. Webster, 1 Johns. C. 145; Mead v. Steger, 5 Porter, 498.]

2. The widow of Mayfield, one of the makers of the notes sued on, was a competent witness; if she had any interest in the matter it was against the party calling her, as the estate of her husband might be called on for contribution. There is no force in the objection that the entry abating the suit was not made at the time of the taking of her deposition. The suit was abated as to him, by his death, and the suggestion to the court is for the purpose of reviving it.

3. The deed offered by the defendant, made by the trustee to him, reciting the payment of the consideration therein expressed, was not conclusive of that fact, even as against the trustee. Formerly, it appears to have been considered that the party was estopped by his deed from showing that the consideration acknow-

ledged in the body of the deed to have been received, was not in fact paid, but the law is now well settled to be otherwise, and that such an acknowledgment in the deed, is a mere receipt, and as much open to explanation, as if endorsed on the back of the deed. [Shepherd v. Little, 14 Johns. Rep. 210; Bowen v. Bell, 20 ib. 338; Mead v. Steger, 5 Porter 498.]

But in this case, although the actual receipt of the purchase money by the trustee would have been good against the plaintiff, as the former was acting by virtue of a power from the latter, and thereby created an agent for that purpose, it might well be questioned whether his *acknowledgment* of such payment, was evidence of that fact against the plaintiff, as he was a competent witness. He was in fact examined in the cause, and expressly swore that no part of the consideration was paid, but ten dollars. The charge of the court therefore, that the jury had nothing to do with the questions arising under the deed, was substantially correct.

Let the judgment be affirmed.

BURNS v. THE STATE.

1. The several acts which authorise a court to tax a prosecutor, with the costs of the prosecution, extend to cases of misdemeanor only, and even in such, the record must disclose that the prosecution appeared to the court to be frivolous or malicious.

Writ of Error, allowed by the Chief Justice, to the Circuit Court of Benton county

The plaintiff in error was the prosecutor of a certain individual indicted for petit larceny. He was acquitted of the charge, and the court, after rendering its judgment on the verdict of not guilty, proceeded, on the motion of the counsel for the person thus discharged, to render judgment against the prosecutor for the costs, for which the execution was directed to issue.

The object of the writ of error is to reverse or set aside this conviction.

Rice and Peck, for the plaintiff in error—cited, Digest 122, § 55; ib. 452, § 8.

Martin and Stone, *contra*.

The Attorney General considering the case as between the prosecutor and the defendant to the indictment, declined to argue it.

GOLDTHWAITE, J.—We have two enactments upon the subject of taxing prosecutors with costs; the first was passed in 1807, and directs that whenever the State shall fail upon the prosecution of any offence of an inferior nature, the court, at its discretion, may order the costs to be paid by the prosecutor, in case such prosecution shall appear to have been frivolous or malicious; the other is an act of 1811, which imposes the duty on the attorney general, to mark on all bills of indictment the name of the prosecutor, and if the State shall fail in the prosecution, it is made the duty of the court, if the prosecution appears frivolous or malicious, to order the prosecutor to pay costs.

We think both of these enactments were intended to apply to the same class of prosecutions, notwithstanding the generality of the terms used in the latter act. This appears from the fact that it is the duty of the public solicitor to cause the proper investigation to be made with respect to all crimes, as distinguished from trivial misdemeanors, whether a prosecutor does or does not appear. [Digest 46, § 3.] It is not a just conclusion that offences against the morals of a community are allowed to escape a prosecution, unless there is some private prosecutor. Doubtless then, in both of these statutes it was intended to prevent frivolous or malicous prosecutions, for that class of misdemeanors affecting individuals only, and of the class also that the prosecutor and defendant would be allowed to compound under the leave of the court.

But even as to them the authority of a court is limited to cases which shall appear to be frivolous or malicious, and in order to support a summary conviction for costs in any prosecution, the reason must be stated and shown upon the record. We can conceive of no judgment whatever, which can be rendered by a

court, without a sufficient reason appearing for it, and the present does seem to be a case of exception to the general rule.

If, however, it was entirely unnecessary in any case to which these statutes apply, to set out the grounds of the conviction for costs, the judgment here could not be sustained, as the offence prosecuted was not within the classes intended to be covered.

The conviction must be reversed, and the judgment for costs vacated.

COTTRELL v. VARNUM, FULLER & CO.

1. Where a garnishee admits that he is indebted to the defendant in execution, in a sum of money to be paid at a future day, judgment may be rendered against him, with a stay of execution until the maturity of the debt.

Writ of Error to the Circuit Court of Lowndes.

The plaintiff in error was summoned as a garnishee, at the instance of the defendants, to state on oath what he was indebted, &c. to J. H. McMichael & Co., against whom the defendants in error had recovered a judgment in the Circuit court of Lowndes. At the fall term, 1839, the garnishee appeared and answered that he was indebted to James B. Stephens, one of the firm of J. H. McMichael & Co. in the sum of twelve thousand dollars, payable by promissory note, dated in March or April preceding, and due on the first day of April, eighteen hundred and forty-two. On this answer a judgment was rendered against the garnishee for the amount of the judgment recovered against McMichael, being fourteen hundred and six dollars damages, and eighteen 31-100 dollars costs, with interest on the damages until paid; and execution was stayed until the first day of April, eighteen hundred and forty-two.

Elmore, for the plaintiff in error.—By the common law, no

judgment could be rendered, or suit maintained upon a promissory note, or other indebtedness, until after its maturity. Our statute authorises an attachment to issue for the recovery of a debt not due, but the proceedings must be stayed until its maturity.—[Aik. Dig. 39, § 7.]

The proceedings on garnishment, issued after judgment, shall be the same as in case of garnishment issuing on attachment.—[See Acts of 1837.] In the latter, the court can only render judgment "for all sums of money acknowledged to be due to the defendant" from the garnishee. [Aik. Dig. 42, § 19.] The statute means by the term "due," a debt *now payable*, not one to be paid *in futuro;* such is the sense in which it is used in a kindred act. [Aik. Dig. 39, sec. 7.]

By rendering a judgment against a garnishee, where he shows the debt which he has contracted is to be paid at a future day, he is deprived of the right of rescinding the contract, or of making any defence against its payment, which may afterwards arise. The case of the Branch Bank at Mobile v. Poe, [1 Ala. Rep. N. S. 396,] does not sanction the judgment of the Circuit Court.

The correct course in this case, would have been to stay proceedings until the note matured. Sergeant on Attachment, 65, says that judgment may be rendered before the debt is payable, but the authorities cited by the author do not sustain him. [See 2 Dall. Rep. 211.]

Cook, for the defendant.—The case of the Branch of the Bank at Mobile v. Poe, is an authority to show the regularity of the judgment in the present case; and to the same effect is Sergeant on Attachment, 65.

COLLIER, C. J.—The only question raised in this case is, can a judgment be rendered against a garnishee who admits an indebtedness to be discharged at a future day, previous to the maturity of the debt. The nineteenth section of the attachment act of 1833, enacts that a person summoned as a garnishee, shall answer upon oath what he is indebted to the defendant, &c.; and upon his examination it shall be lawful to enter up judgment, and award execution against him for all sums of money acknowledged to be due to the defendant from him, &c., or so much as shall be sufficient to satisfy the debt, &c. [Aik. Dig. 42.] The "money

acknowledged to be due," it is supposed by the counsel for the plaintiff in error, means, that which is now payable, and which the creditor might have demanded at the time of the garnishee's appearance. If this question were to be considered as entirely *res integra*, without regard to what has heretofore been the practice in such cases, the argument would be entitled to great consideration. But as we regard it rather a question of practice than as affecting the rights of the garnishee, whether a judgment shall be rendered with a stay of execution, or the proceeding shall be continued in Court from time to time until the debt becomes payable, we think it entirely competent for the plaintiff to pursue either course; and as the former has been the most usual, we feel the less disposed to hold it to be irregular.

By the service of a garnishment on a debtor of a defendant, the plaintiff acquires a lien on the debt for the satisfaction of his demand, which cannot be divested by any arrangement between the defendant and garnishee; and the judgment only consummates the legal transfer of so much of the garnishee's indebtedness as is condemned thereby, to the payment of the plaintiff's demand. In this view, the argument that the rendition of the judgment previous to the maturity of the debt, would prevent a rescission of the contract between the defendant and garnishee, out of which the liability of the latter arose, can have no influence; since a rescission as against the plaintiff could have no effect.

If any thing should occur subsequent to the garnishee's examination, which would furnish a legal defence to an action against him by the defendant, if remediless at law, he might resort to a court of equity, and there have the benefit of that defence by perpetually injoining the plaintiff's judgment against him. And this would be the garnishee's only mode of redress if the proceedings against him were to be stayed until the debt matures; unless the court, in its discretion, were to permit an amendment of his answer. So that whatever practice be adopted in a case like the present, the garnishee is not foreclosed from any defence arising after his answer, which he could have successfully urged against the defendant.

It has been held in Tennessee, that a debt not due cannot be attached. [Childress v. Dickins, 8 Yerg. Rep. 113.] While in North-Carolina, it is said that the attachment law makes notes not yet due, whether given for money or specific articles, liable

to be attached; and this although the notes were given for property in which the debtor had only an equitable interest. [Peace v. Jones, 2 Murph. Rep. 256.] In Massachusetts, it has been decided, under what is there called trustee process, which is similar to the garnishment here, that a debt, either *solvendum in praesenti*, or *solvendum in futuro* may be attached; but if it be uncertain whether any thing will ever be demandable by virtue of the contract, it cannot be called a debt; and consequently can not be thus reached. [Wentworth v. Whittemore, 1 Mass. Rep. 471.] And in Maryland, it has been determined, than an attachment is a lien upon a note in the hands of a garnishee, whether due or not. [Stewart v. West, 1 H. & Johns. Rep. 536. So, it was held in Pennsylvania, that a bond from a garnishee to the plaintiff's debtor, may be attached, although not due, and execution may issue for the amount when it falls due. [Walker v. Gibbs, 2 Dall. Rep. 211—see also, 1 Yeates' Rep. 255.] And Mr. Sergeant, in his treatise on attachment, lays down the law thus: "Money growing due upon a bond or contract, may be attached before it is due and payable, and judgment may be against the garnishee; but execution shall not issue till the time of payment." We have not looked into the statute law of the States, whose decisions we have cited, to see how far they were probably influenced by any peculiarity in their legislation. This was unnecessary, as our conclusion is influenced by what has been the practice in this State: in addition to which, we have heretofore decided, that a debt not matured may be reached by garnishment.—[The Branch Bank at Mobile v. Poe, 1 Ala. Rep. N. S. 396.]—Without extending this opinion to greater length, we have only to declare that the judgment of the Circuit court is affirmed.

WATSON & SIMPSON v. SIMPSON.

1. An execution cannot be levied on any of the articles exempt from levy and sale, for the use of families, although the execution may have come to the sheriff's hands before the defendant in execution married, and became the head of a family.

ERROR to the Circuit Court of St. Clair.

This was a trial of the right of property. From the testimony it appeared that a writ of *fieri facias* against the defendant in execution was issued, and came to the sheriff's hands, whilst the defendant in execution was the owner of the mare, which was subsequently levied on, but that before such levy he married and became the head of a family. The court charged the jury, that the marriage of the defendant before the levy of the execution, created a *lien* in favor of the family of the defendant in execution, paramount to the general *lien* of the plaintiff in execution, if the defendant had but one horse, &c.; to which the plaintiff excepted, and now assigns for error.

BAYLOR, for the plaintiff in error.
W. B. MARTIN, *contra.*

ORMOND, J.—The statute by which this question is to be ascertained, declares that "the following articles shall be retained by and for the use of every family of this State, free and exempt from levy or sale by virtue of any execution or other legal process, that is to say," &c. Among the exempted articles is "one work horse."

Statutes of this description have always received a liberal construction to effectuate the intent of the legislature, which was to preserve from levy and sale, under legal process, certain articles necessary to the comfortable subsistence of a family, and we are unable to perceive why this provision, thus made by law for the comfort of the family, should fail of its effect, because the family

came into existence after a general *lien*, by operation of law, had attached on the property in favor of the creditor.

A *lien* which is not created by the act of the parties, but is given by law, may be taken away by law, and of this we have an example in the same act, which declares that when a term shall elapse after the suing out of an execution, the *lien* created by the issue of the junior execution be preferred.

But indepependent of this analogy, the language of the act is express, that the exempt articles shall be free from *levy or sale*, by virtue of legal process, and be retained for the use of the family. This is a direct prohibition to do the act spoken of; there is no room for doubt; and as the power of the legislature, in the passage of the act, cannot be questioned, it follows that the court below did not err, and its judgment is therefore affirmed.

MOORE v. HORN & BOULDIN.

1. When the service of a writ is acknowledged by the defendant, but the proof of it is omitted to be entered upon the record at the time of the judgment, it may be entered *nunc pro tunc*, at a subsequent term, and after writ of error sued out.
2. Upon the affirmance of a judgment where a reversal is saved by an amendment *nunc pro tunc*, pending the writ of error, judgment is notwithstanding rendered against the sureties in the writ of error bond, for damages and costs.

Writ of Error to the Circuit Court of Madison county.

Action of debt, by Horn & Bouldin against Moore. On the summons is the following endorsement: Service acknowledged; G. Moore. Teste, Wm. H. T. Brown, clerk.

At the proper term of the court, a judgment by default was entered against Moore, but there is nothing in the judgment entry to show that any proof was then, or previously made of this acknowledgment of service.

In the vacation, after this judgment, Moore sued out his writ of error, and gave a supersedeas bond.

At the next term, and pending the writ of error, the plaintiffs, without any notice to the defendant, suggested to the court, that the acknowledgment had been proved in open court, when the judgment by default was rendered, and that it was then omitted to be entered by a clerical misprision. Two affidavits were then submitted, one by the attorney, stating that it was proved by the subscribing witness in open court, and ordered to be entered of record; and the other, of the subscribing witness to the acknowledgment of service, who stated it was made in his presence, but that he had no remembrance of being sworn at the time when the judgment was entered. On these affidavits, the court ordered that the ministerial error should be corrected, and it be entered *nunc pro tunc*, that the acknowlegment of service of the writ was proved in open court by the testimony of the said witness, Brown.

It is now assigned for error,

1st. That the court rendered judgment without service of process on the defendant.

2. In entering *nunc pro tunc*, the supposed acknowledgment of process.

Parsons and Peck, for the plaintiffs in error.

Moore, *contra.*

GOLDTHWAITE, J.—1. It has several times been held by this court, that a defendant may voluntarily come before a court to answer a suit by the acknowledgment of the service of the process, and that such acknowledgment when made, is equivalent to service by the proper officer. In such cases, however, the entry of the acknowledgment upon the process, is not by itself, sufficient to sustain the jurisdiction, but the *factum* of the acknowlegment must be proved and shown upon the record, to have been so. [Earbee v. Ware, 9 Porter 291; Welch v. Walker, 4 Porter, 120.]

As a defendant may come before a court in this manner, and thus give it jurisdiction to render a judgment against him; there is no good reason why the *factum* of the acknowledgment should not be subsequently shown, if it is omitted to be entered upon the record when the judgment is rendered. It is the fact that an ac-

knowledgment of service was made, and not the proof of it, which gives the court jurisdiction. We consider it in the same regard as the sheriff's return, which may be entered at any time, according to the truth, although entirely omitted when the judgment was had. Such was the case of Hefflin v. McMinn, [2 Stewart, 492,] when, after error brought, the judgment was sustained by allowing the sheriff to enter his return on the writ. In principle, the case here is precisely the same; the acknowledgment was made, and if we concede there was no proof of it at the time of the judgment, it will not prevent the plaintiff from sustaining his case by showing *nunc pro tunc*, to the court below, that the defendant was rightfully before the court. We think it was competent for the circuit court to permit the acknowledgment of service to be proved *nunc pro tunc*, and when made, it relates back and sustains the judgment.

2. It is urged however, that if the judgment is affirmed, it should it be at the cost of the defendants in error, and without injury to the plaintiff's sureties in the error bond, as the record was defective when the writ of error was sued out. On this point there seems to be some conflict of decision, as it was refused to affirm with costs and damages, in Brown v. Tarver, [Minor 370] where an amendment was made after error brought. But in Hefflin v. McMinn, [2 Stewart, 492] costs and damages were given in a case not to be distinguished from this. The rule in the English courts, is not to give costs, if the plaintiff will proceed no further with his writ of error. But even then, if the amendment is made by virtue of the statute of amendment, costs are always allowed. [Tidd's Prac. 771.] In neither of the cases decided by this court on this point, nor in the subsequent case of Evans v. St. John, [9 Porter, 186,] where it is adverted to, is the consequence of superseding the judgment by writ of error bond, considered, and in our opinion they are of such importance as to control the practice. By superseding the judgment, the lien of the plaintiff is completely destroyed, and if he has no remedy on the bond against the sureties, irreparable loss may arise.

Such consequences ought not to be allowed, and in our opinion the judgment must be affirmed, with costs and damages.

COLLIER, C. J.—It is conceded that at the time the writ of error was sued out in this case, there was an error in the record,

for which the judgment should be reversed; but it is insisted that the amendment made in the circuit court, during the pendency of the cause here, cured the defect, and entitled the defendants in error to a general judgment of affirmance. My opinion of the law upon this point is different from that expressed by my brother GOLDTHWAITE. I do not deny that the judgment should be affirmed, but think the defendant should pay the costs, and that there should be no judgment against the sureties in the writ of error bond. Any other conclusion might greatly prejudice sureties in such cases, by imposing upon them a liability in consequence of a *post factum* act, to which they were not parties; while the law is disposed to treat them rather with indulgence than harshiness, and accord to them all legal defences which they have not yielded up. I do not understand that the practice in this court has been different from what in my judgment it should be, and hence I feel free to declare my own conclusions upon the law of this case.

POOL v. THE CAHAWBA AND MARION RAIL ROAD COMPANY.

1. Where the points presented by the bill of exceptions are reserved at the trial, but the bill itself is not drawn up and sealed until six months thereafter, the appellate court, notwithstanding the delay in perfecting the bill, will consider it as a part of the record: and this, although no note of the point was made by the judge when the exception was taken.

WRIT of Error to the Circuit Court of Perry.

A. GRAHAM, for the plaintiff in error.
DAVIS, for the defendant.

COLLIER, C. J.—It is conceded by the parties, that the judgment in this case must be reversed upon the authority of Carlisle

v. The C. & M. R. R. Co., at the last term, if the bill of exceptions sent up with the transcript can be considered as a part of the record.

The bill of exceptions is in the usual form, showing that the points presented by it, were reserved at the trial; but it appears that it was not drawn up and presented for the signature of the judge who presided, until about six months thereafter. In Strader, Perrine & Co. v. Alexander, *et al.* [9 Porter's Rep. 441,] it was considered no valid objection to a bill of exceptions that it was not sealed, pending the term of the court at which the case was tried. The court say, "if the exception be taken at the trial, it may be noted by the judge, and the bill sealed at any time, either during the term or afterwards." The object of taking a note is merely that a recollection of the point may be retained, and not indispensable to the legality of the bill; if, therefore, the judge remembers it, with sufficient distinctness to enable him to certify it as it arose at the trial, he can perfect the bill of exceptions after court. There is certainly some danger of a loose practice growing up under this indulgence, which may lead to misunderstanding between the bench and the bar, but the remedy for this, is with the judge, who may quicken the diligence of the counsel by requiring the bill to be prepared during term time. [See further Sikes v. Ransom, 6 Johns. Rep. 279; Pratt v. Malcolm, 13 Johns. Rep. 320; Walton v. The U. S., 9 Wheat. Rep. 651; Bartlett & Warring v. Lang's adm'rs 2 Ala. Rep. 161.] The cases cited by the defendant's counsel from 3 Cow. Rep. 33, and 3 Wend. Rep. 312, depend upon rules of practice of local application in New York, and consequently have no influence here.

The judgment is reversed, and the cause remanded.

DUMES, ADM'R, v. McLOSKY.

1. The act of 17th January, 1834, authorising a distress for rent in the city of Mobile, does not justify the rendition of a general judgment against the tenant, but merely a condemnation of the goods distrained. The proceeding is authorised only against the tenant, and will not lie against his administrator.

ERROR to the Circuit Court of Mobile.

This was a distress for rent, in the city of Mobile, commenced by the defendant in error, against the plaintiff in error, as administrator of Edmund Bacon, deceased.

Affidavit having been made by the defendant in error, that Bacon was indebted to him for the rent of a house in Mobile, in the sum of five hundred dollars, and that the plaintiff in error was his administrator, the justice issued a distress warrant, directed to the sheriff, and returnable to the circuit court. Upon this, the sheriff returned, that he had levied the warrant upon certain goods, which are described, and that by the directions of the plaintiff, he had left the goods in the possession of Bacon, as his bailee.

The plaintiff filed his declaration in debt, and the defendant having made default, a judgment was rendered for five hundred dollars debt, two hundred and twenty-four dollars forty-nine cents, damages, besides costs, "to be levied of the goods and chattels, &c. which were of the said Edmund Bacon, at the time of his death, in the hands of the said Dumes, to be administered, if so much he hath in his hands, to be administered; if so much he hath, not, then the debt, damages and costs to be levied of the proper goods and chattels, lands and tenements of the defendant."

From this judgment, the defendant prosecutes this writ, and assigns for error,

1. That said proceedings were commenced against an administrator.

2. That six months had not elapsed when the suit was commenced.

3. That a final judgment was entered without the intervention of a jury.

4. That a judgment is entered *de bonis propriis.*

GIBBONS, for the plaintiff in error.

STEWART, *contra.*

ORMOND, J.—This proceeding is upon a statute applicable only to the city of Mobile, passed 17th January, 1834; "that whenever any landlord, his agent, or attorney, shall make complaint, on oath, to any justice of the peace, in the city of Mobile, that any person is indebted to him for the rent of any tenement within the corporate limits of the city, and shall enter into bond and security in four times the amount of the rent alledged to be due, conditioned to pay the defendant all costs and damages for the wrongful suing out of the warrant hereinafter mentioned, it shall be lawful for the justice of the peace to issue his warrant, returnable before him, not less than four, nor more than ten days from the time the warrant shall be issued, directed to any constable of the city, requiring him to seize, and to take into his possession any goods and chattels which may be found in the tenement for which the rent shall be due, and the constable shall keep the goods and chattels so seized, to answer the judgment which may be rendered by the justice of the peace in the case, unless the debt shall be sooner paid, with all costs, and the justice on the return of the warrant shall proceed and render judgment according to the merits of the case."

It was also provided that the defendant might replevy the property by entering into bond, and that upon failure to deliver the property, the bond should have the force of a judgment.

The 2d section requires the warrant to be made returnable to the circuit or county court, where the sum claimed exceeds fifty dollars.

The remedy given by this act is a proceeding *in rem*—it is a right given to the landlord to condemn any of the defendant's goods found on the premises, for the payment of rent in arrears. No other property of the tenant is subject to the distress than that found on the premises, nor will the judgment operate against any other property of the defendant, than that taken by the distress warrant. It is proper, however, that the judgment should ascer-

tain the amount of rent due, because, if the property distrained is replevied, and not delivered to the officer to be sold in satisfaction of the judgment, an execution issues on the replevy bond for the amount of rent due, as ascertained by the judgment; and also to inform the officer what amount of money to make out of the distress. The proper judgment of the court is a condemnation of the property levied on by the distress; and no other property of the tenant can be sold by the sheriff, though the goods distrained may be insufficient to satisfy the judgment.

The judgment in this case, not being a condemnation of the goods distrained, but general against the administrator of the tenant, to be levied on any of the goods, lands or tenements, of the deceased, is erroneous. But there is a more formidable objection than this, to this proceeding, which is, that it will not lie against the representative of the tenant, but must be prosecuted against him individually. This is a summary remedy, and according to all our decisions upon this class of cases, cannot be extended by construction beyond its terms. To permit it to lie against the personal representative after the decease of the tenant, would be attended with mischievous consequences, which it is not necessary to enumerate, as the action is not given after the death of the tenant. [See Logan, adm'r, v. Barclay, 3 Ala. Rep. 361.]

Let the judgment be reversed.

THE STATE v. BRINYEA.

1. The mode of proving insanity is by shewing a series of actions or declarations which evince an aberration of mind; and it is not, in general, proper to take the opinion of witnesses derived from knowing or hearing the facts deposed to.—Whether there may not be exceptions to the general rule, arising out of some peculiar relation or connexion of the witness (whose opinion is offered) to the supposed lunatic—*Quere.*
2. If a person, after verdict, and before sentence, becomes insane, it is good cause for staying the sentence, but where the question of insanity has been passed on by the jury, a motion to the court to stay the sentence cannot be entertained.

3. When the prisoner's guilt is clearly made out, if he relies on insanity as a defence, he must make it out to the satisfaction of the jury beyond a reasonable doubt, which is the rule laid down in the State v. Marler, [2 Ala. 43.]
4. If a charge is considered objectionable on account of supposed obscurity or tendency to mislead the jury, those against whom it is to operate must ask an explanation of the Court, otherwise this Court will not reverse for that cause, if the charge is substantially correct.

ERROR to the Circuit Court of Montgomery.

This cause is presented on questions reserved for the opinion of this Court, as novel and difficult.

On the trial the prisoner relied on the defence of insanity, and introduced witnesses who testified to acts and declarations of the prisoner tending to prove insanity; whereupon his counsel proposed to ask the witnesses for their opinions as to the sanity or insanity of the prisoner, as deduced from the acts or declarations testified to by them. This question was excluded by the Court, the witnesses not being of the medical profession.

The Court charged the jury that they must believe the offence charged in the indictment to have been committed; that if they entertained a reasonable doubt as to the commission of the act, the prisoner was entitled to the benefit of it; but the commission of the act being proved, and the prisoner relying on insanity as an excuse, the rule was reversed. In that event the prisoner was bound to make out by testimony, beyond all reasonable doubt, that he was insane at the time the act was committed, by proof clear, strong and convincing; and if upon the testimony the jury should entertain no reasonable doubt of the defendant's sanity, they should find him guilty.

When the prisoner was called before the Court for sentence, after a verdict of guilty against him, the counsel for the prisoner suggested that he was at that time of unsound mind, and moved an arrest of judgment on that ground. The suggestion was supported by affidavits, conducing to prove its truth, but the Court declined to consider the motion, and reserved the questions as novel and difficult.

ATTORNEY-GENERAL, for the State.
MAYS, for the prisoner.

GOLDTHWAITE, J.—1. There is a considerable diversity of decision upon the point, whether a witness, not being a physician, can properly be allowed to give his opinion in evidence, when the matter to be ascertained is the insanity of an individual. [The cases on this subject are collected in Cowen's and Hill's notes to Philips on Evidence, 759, note 529.]

Although the greater number of these recognize the rule as ordinarily understood, and as declared by the Circuit Court, yet there are some which seem to sustain the position insisted for by the prisoner's counsel. Our intention is not to review them, as it would lead us into unnecessary prolixity, and as the principle applicable to this case can be ascertained without aid from them.

When it is necessary to prove to a jury that one is insane, this is done by shewing a series of actions or declarations which evince an aberration of mind; the conclusion of insanity is to be drawn by the jury, and must be deduced from the actions or declarations of which evidence is given. Different individuals, sometimes draw different conclusions from the same act; and if their opinions were admissible as evidence, it might often happen that different opinions formed from the same conduct, would go to the jury, having no other tendency than to embarrass and mislead them. As the conclusion of the jury has to be formed from the acts and declarations before them as evidence, it is entirely immaterial what opinions are formed by others, and for this reason, such opinions in this case were properly excluded from the jury.

It is proper to remark here, that we have not entered into the consideration of exceptions to the general rule, arising out of some peculiar relation or connexion of the witness to the person whose sanity is questioned, because nothing but the general question is now presented.

2. If a person, after verdict, and before sentence, becomes insane, it certainly is a good reason to stay the sentence; but that is not this case. We do not understand that any change in the condition of the prisoner was shown to have taken place since the impannelling of the jury. It was then, in effect, requiring the court to arrest or stay the judgment, for the same reason which had been unsuccessfully urged before the jury in defence of the criminal charge. We think the Circuit Court properly refused to entertain the motion.

3. The objection to the charge cannot avail the prisoner, as it is in strict accordance with the rule declared in Marler's case.—[2 Ala. Rep. N. S. 43.] The counsel for the prisoner argues that the charge was, that a different degree of proof was necessary to make out a defence than was sufficient to produce a conviction; but we do not so understand it. The court, in substance, declares, that it was incumbent on the State to make out the prisoner's guilt, beyond all reasonable doubt; and if the jury doubted the evidence as to the commission of the act, the prisoner was entitled to the benefit of that doubt; but if the act was incontestably proved, and the prisoner relied on insanity to excuse himself, the case was *reversed*. The prisoner then was bound to make out, by testimony, beyond all reasonable doubt, that he was insane at the time the act was committed, by proof, strong, clear and convincing; but if upon testimony, the jury should entertain no reasonable doubt of the defendant's sanity, they should find him guilty.

It is true we do not very clearly comprehend what was intended by the court, when it said the case was *reversed*, if insanity was relied on as a defence; but, whatever it was, it certainly was not intended to instruct the jury, that they should convict the prisoner if they entertained doubts of his sanity. The charge, it is true, is in the negative, that if the jury had no reasonable doubt of the sanity of the prisoner, he should be convicted. This, as it seems to us, is precisely equivalent to a charge, that if a reasonable doubt of his sanity was entertained, the jury should acquit. If the charge was objectionable, on account of its obscurity, or so considered, the prisoner's counsel should have requested the proper explanation; if refused, or not given as asked for, that tendency to mislead would have been made apparent, and, under the decision in Marler's case, the judgment would have been reversable. Let the judgment be affirmed.

SORRELLE'S EXR'S v. SORRELLE.

1. A legatee whose legacy has never been assented to, cannot set-off the provision made for him by the will, against an action brought by the executors for the recovery of money due to the testator.
2. The construction of a will, or other writing, where the meaning and intention of its author, is to be gathered from the paper alone, involves a *mere legal inquiry*, which is to be decided by the court.
3. Where a creditor bequeaths a legacy to his debtor without noticing the debt, and after the testator's death, the securities for the debt are found uncancelled among his papers, the legacy is not considered even *prima facie* a release or extinguishment of the debt.

WRIT of Error to the County Court of Dallas.

This was an action of assumpsit, by the plaintiffs in error, against the defendant, on three several promissory notes, for the sum of eighteen hundred dollars each, dated the 15th September, 1837, and payable on the first day of March, 1839, '40 and '41, to the plaintiff's testator. The defendant pleaded *non assumpsit*, payment and set-off, and several other pleas, on which the plaintiff took issue. He also pleaded in short, "payment and satisfaction," to which the plaintiffs demurred, and the demurrer being overruled, they joined issue; and thereupon, the cause was submitted to a jury, who returned a verdict for the plaintiffs, for about one-third the sum sought to be recovered, and on this verdict a judgment was rendered.

From a bill of exceptions in the record, taken at the instance of the plaintiffs, it appears that the defendant gave in evidence the will of John Sorrelle, the plaintiffs testator, and insisted that the provision therein made for him, released him from the payment of the notes sued on. The will, after bequeathing something to one of the testator's children, and deducting something from two others, so as to equalize the shares of all, bequeaths the estate to his children to be divided between them.

The plaintiffs counsel insisted that it was the province of the court to determine the construction of the will, and to expound to the jury the meaning and intention of the testator, but the court

ruled otherwise; "and instructed the jury, that they were to take the will and examine it, and if from its terms, they believed that it was the intention of the testator to release the defendant from the payment of the notes mentioned in the declaration, they should find for the defendant." The counsel for the plaintiffs also asked the court to charge the jury, that by the terms of the will, the defendant was not thereby released from the payment of the notes in suit; which charge the court refused to give.

Edwards, for the plaintiffs in error, insisted, that the provision made in the will, for the defendant, cannot be set up as a defence.

1. Because he cannot coerce a distribution until the expiration of eighteen months from the probate of the will.

2. Because it is uncertain what his share of the estate will be until the debts are presented. [8 Porter's Rep. 380.]

It is the duty of the court to determine the meaning of a will; especially where, as in this case, it is to be ascertained by its inspection, without reference to extrinsic proof. [1 S. & Por. Rep. 221; 1 Starkie's Ev. 429.]

It cannot be inferred from the will, that the testator intended to release the defendant from the payment of what he was owing him. [2 Wm's on Exr's 810; 2 Johns. Cases, 98; 12 Wendell's Rep. 67.]

R. Saffold, and G. W. Gayle, for the defendant. The will being silent as to the debt due the testator by the defendant, it may be inferred that its release was intended. But if not released, the provision made for the defendant should prevent a coercion of its payment, and he should be allowed to show the amount of his distributive share, and thus far defeat a recovery. If the plaintiffs were not prejudiced by a reference of the construction of the will to the jury, they cannot complain, though the course of the court may have been irregular. They cited, Toller's Exr's 338; 3 Starkie's Ev. 1013, '14, 1697; Wm's on Exr's 810–11; Roper on Ex'rs 62; 6 Am. Cond. Law Cases, 419; 19 Johns. Rep. 313; 4 Wend. Rep. 449; 12 ib. 67.

COLLIER, C. J.—It is scarcely necessary to inquire whether the defendant could insist upon the provision made for him in the will of his father as a set-off to the action, and *pro tanto*

defeat a recovery. We however, consider it perfectly clear, that such a defence is not allowable.

1st. Because his share of his father's estate was not a debt or demand due *in praesenti*, for the recovery of which an action could be maintained, it not being assented to by the plaintiffs, or the time arrived when by the statute it was demandable.

2d. Because it would disturb the legal course of administration, and possibly, injuriously affect creditors, whose rights are paramount to the beneficiaries under the will.

The material questions are,

1. Was the exposition of the will regularly referred by the court to the jury?

2. Does the will in itself operate a release of the debt owing by the defendant to the testator, to the extent of the interest it confers upon the former?

1. Starkie, in his work on Evidence says, the construction of a written document, is matter of pure law, in all cases where the meaning and intention of the framers, is by law, to be collected from the paper itself. As in the instances of judicial records, deeds, &c.; but where the meaning is to be judged of by the aid of extrinsic circumstances, the construction is usually a question of fact for the jury. [1 Vol. 429.] And such seems to be the result of the adjudged cases on the point. [3 Phil. Ev. C. & H's ed. 1420.] In the present case, it appears that the question did not arise upon the construction of the will, in connection with parol evidence, but the court referred it to the jury to say, from a mere inspection of the paper, what was the intention of the testator. This involved a legal inquiry, which it was the province of the court to determine. If the law were otherwise, and there were no settled rules by which the meaning of writings could be adjusted, no man could tell with certainty, what terms to employ in his transactions; for the interpretation of one jury might be very different from that which another might give to the same document.

There are, however, cases in which parol evidence is admissible to show the intention of the parties to a written instrument, which is in some measure equivocal. [Ely v. Adams, 19 Johns. Rep. 313, and cases there cited; 3 Phil. Ev. C. & H's ed. 1420, and cases cited.] To ascertain when it is admissible, in order to determine the meaning of wills, see 2 Lomax's Ex'rs and Adm'rs

31, 99 and cases cited. It is unnecessary to notice more particularly, the authorities on this point, and they are only referred to, that they may be consulted, if in the ulterior progress of the cause, it should be desired.

2. In respect to the second question, it is laid down, that the gift of a legacy may be so framed, as to be the release of a debt; but to have this effect, the intention must be clear. Where a creditor bequeaths a legacy to his debtor, and either does not notice the debt, or mentions it in such a manner, as to leave his intention doubtful, and after his death the securities for the debt, if there were any, are found uncancelled among the testator's property, the legacy to the debtor, is not considered as necessarily, or even *prima facie*, a release or extinguishment or the debt; but it requires evidence clearly expressive of the intention to release. [2 Lomax's Exr's & Admr's 99; 2 Wm's on Exr's 810.] And the law is stated in equivalent terms after great consideration in Clark v. Bogardus, [12 Wend. Rep. 67. See also Williams v. Crany, 5 Cow. Rep. 368; ib. 246, and 4 Wend. Rep. 449.]

In the case at bar, the testator not only does not mention in his will, the debt in controversy, but keeps the evidence of it in his possession uncancelled at his death, and so far as any inference can be drawn from the manner in which he has dispensed his bounty, it is adverse to the idea of a release. He very clearly manifests the intention to distribute his estate equally between all his children. In addition to the general direction to that effect, he bequeaths to one of his daughters a sufficiency of property to place her upon the same footing with the children who had been previously advanced; and also directs that the shares of two of his sons shall be subject to a deduction, for money he had expended in the payment of their debts.

On both the questions considered, the county court erred: its judgment is consequently reversed, and the cause remanded.

CROW v. THE DECATUR BANK.

1. It is error to render a final judgment by default against a defendant who has interposed the plea of *non est factum*.

ERROR to the County Court of Morgan.

MARTIN, for the plaintiff in error.
MCCLUNG, *contra*.

ORMOND, J.—The Bank commenced a suit, by motion, against the plaintiff in error, on a promissory note for two thousand dollars, to which he appeared and pleaded, denying the execution of the note, which was verified by affidavit. At the trial of the cause he failed to appear, and judgment final was rendered against him by default; this is now assigned for error.

The statute of this State [Aik. Dig. 283, § 137] makes every writing on which a suit is commenced, evidence of the debt or duty for which it was given, and prohibits the defendant from denying the execution of the instrument sued on, except by plea, supported by affidavit.

The effect of this statute is, that when a sworn plea is interposed, the parties stand as they did at common law, when the general issue was pleaded, which devolved on the plaintiff the necessity of proving the execution of the instrument sued on. That being done in this case, and the statutory presumption in favor of the instrument being destroyed by the plea no judgment could be rendered in favor of the plaintiff, but on proof that the note was made by the defendant, or by his authority. The necessity for this is not waived by the default, for the reason stated, that the note is not *prima facie* evidence, and the judgment being by default, the presumption is excluded that any evidence whatever was offered by the plaintiff to sustain the allegations of the motion.

The case of Dougherty v. Colquett, [2 Ala. Rep. 337,] is unlike this case. There, a judgment by default was taken after a plea, but the plea in that case did not question the plaintiff's

cause of action, but merely denied his right to maintain that action, because another suit was depending for the same matter. This was affirmative matter, which the defendant was bound to prove, and was therefore unlike the plea in this case, which casts the *onus* upon the plaintiff.

Let the judgment be reversed, and the cause remanded.

BRANCH BANK AT MONTGOMERY v. CROCHERON, ET AL.

1. A rail road corporation, by its charter, was prohibited from emitting for circulation, any notes or bills; or to make contracts for the payment of money, except under its corporate seal, and then alone for debts contracted by it. The rail road corporation subsequently made a contract with the branch Bank of the State of Alabama at Montgomery, by which the latter agreed to receive in payment of debts, and pay out in circulation, such notes as the former should issue in payment of its debts. The rail road corporation issued certain bills single, in sums from one to twenty dollars, engraved as bank notes, in payment of debts due from it, and these were received by the Bank under its contract with the rail road corporation. Afterwards, the Bank loaned the bills single thus received on certain bills of exchange, at the request of the borrower; the bills being made for the purpose of effecting the loan. *Held*, that these transactions on their face were not illegal, so as to prevent the Bank from recovering in a suit on the bills of exchange. If the bills were lawfully issued by the rail road corporation, they could be lawfully received by the Bank, and again loaned by it. But if the contract was a mere pretext to avoid the prohibition of the charter, it would be void, and the bills single invalid in the hands of any one connected with the illegal contract. The validity, or invalidity of the transaction, depends upon the intention with which the bills single were issued and received, and that is a question for the jury.
2. When a statute prohibits the making by any person or corporation of any note, bill single, &c. for a less sum than three dollars, to subserve the common uses of money and punishes the offence by fine; and the circulation is also punished by fine; the passing of such notes does not necessarily avoid a contract for the loan of money, when the contract is not for the loan of such notes. The rule is, that a contract with reference to the prohibited matter is void; but if the contract is

innocent, and in carrying it out, there is a violation of the statute, this does not avoid the contract, though the offender may be punished for a violation of the law.

3. An agreement by the Branch Bank of the State of Alabama, to receive such bills as a rail road company could lawfully issue, and to pay the same out as circulation, will not avoid a recovery on bills of exchange, given for the loan by the Bank of such bills, as being contrary to the policy of the laws of the State, with reference to its banking institutions.

WRIT of Error to the Circuit Court of Montgomery county.

This action is by the Bank, against the defendants, as parties to a bill of exchange. The defence relied on was, that its purchase was unwarranted by the charter of the Bank, and its consideration illegal and against public policy.

The facts were these: The Wetumpka and Coosa Rail Road Company, had frequently applied to the Bank for a loan, to enable it to carry on the contemplated improvements, but without success; it finally proposed to accept a loan in the notes of the Montgomery and West Point Rail Road Company, of which the Bank held a considerable amount, and this proposition was accepted, and the bill sued on, with several others, together amounting to $20,000, was discounted, and the proceeds paid in the notes of the Montgomery and West Point Rail Road Company, varying from one to twenty dollars. These notes were under the seal of the corporation, but bore the similitude of Bank notes, and were also made payable at the counter of the Bank. At the time of the discount, these notes were depreciated in the market from two to four per cent., but the Bank had taken them at their full value in payment of debts due to it, and was amply secured by the corporation issuing them.

These notes came into possession of the Bank in consequence of an agreement made with the Montgomery and West Point Rail Road Company, by which the former agreed to receive in payment of debts due to it, such notes as the latter should issue in payment of its debts. By this agreement, the Bank also undertook to pay these notes out as circulation, but none were so paid out or loaned, except those used in the transaction with the Wetumpka and Coosa Rail Road Company. The agreement extended only to such notes as the said company should issue in con-

formity with its charter, under the corporate seal, and for the payment of debts due by it.

The bill in suit was made in consequence of the agreement of the Bank to loan the Wetumpka and Coosa Rail Road Company the sum before mentioned, and had no other consideration to support it. The Bank was further secured by a mortgage of the Rail Road, and the property of the Company, for the payment of the bills discounted, but the mortgage is to secure the payment of the bills, and not for a loan of money, *eo nomine*.

It was also in evidence, that no notes had ever been issued by the Montgomery and West Point Rail Road Company, except under their corporate seal, and for debts contracted by the said corporation. These notes circulated as money at the depreciation before named.

Under this state of proof, the plaintiff requested the court to charge the jury,

1st. That if the Montgomery and West Point Rail Road Company had issued no notes except under its corporate seal, and for debts contracted by it, and that such notes formed the consideration of the bill sued on, then the said company had the right to issue such notes in any manner, form, stamp or amount it might think proper; and that the Bank likewise had the right, after such notes were so issued by the company, to receive them in payment of debts, and to pay them out again.

This charge was refused, and the court charged the jury, that the contract entered into between the Montgomery and West Point Rail Road Company and the Bank, to circulate the bonds of the former, was illegal in its inception; and if the bill sued on was received by the Bank as a security for a loan of money made by it to the Wetumpka and Coosa Rail Road Company, to be received in the bonds of the Montgomery and West Point Rail Road Company, obtained by the Bank by said contract, the plaintiff was not entitled to recover.

2d. That although the contract between the M. & W. P. Rail Road Company and the Bank, was illegal yet the defendant could not set up that as a defence to the action, nor that the Bank was prohibited by law from carrying on such a traffic.

3d. That although the Bank, by its charter may be limited to the dealing in specific matters, yet such limitations are directory only, and if they are departed from, a third party cannot set up

the departure as a defence to a suit by the Bank, but that the remedy must either be provided for by law, or the Bank proceeded against by a *quo warranto*.

4th. That if this was the only instance in which discounts had been made by the Bank with the notes of the Rail Road Company, and the discount had been made at the request of the defendants, it was not illegal, and was no defence to the suit.

These charges were severally refused, and the plaintiff excepted, as well to the charge given, as to those refused.

A verdict was found for the defendants, on which judgment was rendered. The plaintiff prosecutes this writ of error, and insists that the court erred in refusing to give the charges asked for, and also in that given.

Elmore and Harris, for the plaintiff in error argued,

1. The Rail Road Company, by its charter is invested with authority to issue notes in payment of its debts. [Pp. acts, 1833, page.]

2. The Bank is not prohibited from making such a contract, or receiving such notes, [Digest 66; 8 Wheat. 349, to 351,] and could lawfully exchange them for bills. [9 Peters, 401; 7 Paige, 646.]

3. If, however, the notes were illegally received by the Bank, this constitutes no defence. [8 Wheat. 353; 2 Ala. Rep. 452; 9 Mass. 423; 16 ib. 94, 103; 3 Rand. 142; 2 Hall's Supl. 526; 3 Rand. 465.]

Goldthwaite and Hayne, *contra*, contended,

1. That this Bank is subject to the same rules of law as if it was a mere private corporation. [9 Wheat. 904; 11 Pet. 325.]

2. The contract between the Bank and the Rail Road Company is void. 1st, because it is unauthorised by the charter of the Bank. [3 Wend. 482; 15 John. 380; 1 Hall's Supl. 526; Angel & Ames on Corp. 145; 2 Conn. 678; 1 Hill, 11; 5 Conn. 561.] 2d, because it was in direct violation of the charter of the Rail Road Company. [Act of 1833 '4, page 119.] 3d, because it is against public policy—the banks of the State alone have the right to issue bills, and the issuance of small bills is expressly prohibited. [Digest, 110; 7 Paige, 653; 8 Ohio, 286.]

3. The bill of exchange was given for money, of which the is-

sue is prohibited by statute. [Acts of 1833 '4, p. 119; Digest 110; 7 Paige, 653; 8 Ohio, 286; 2 Cowen, 699; 8 Gill. & J. 318; 1 E. C. L. R. 268; 15 Johns. 383; 3 Wend. 482; Angel & Ames, 139, 2 Peters, 538; 13 Conn. 249.]

GOLDTHWAITE, J.—The rules of law by which the several charges given, and refused, by the circuit court, are to be tested, can be better considered by ascertaining what acts each of these corporations was authorised to perform, with reference to the matters in evidence.

The proviso of the 2d section of the charter of the Montgomery Rail Road Company declares, "that it shall not be lawful for the said corporation to use any part of its capital stock or funds for banking purposes, nor to emit, for circulation, any notes or bills, or to make contracts for the payment of money, except under its corporate seal, and then alone for debts contracted by it." [Acts of 1834, 119.]

From this, it will be seen, that although the Rail Road Company is permitted to make contracts for the payment of money under its corporate seal, for debts contracted by it, yet it is expressly prohibited from emitting any notes, or bills for circulation. I think the intention to forbid the emission of any paper evidence of debt for circulation as money, by whatever name the emission shonld be called, is perfectly clear, and that it makes no difference whether it is by means of notes, checks, drafts, bills single, bonds, or tokens. The terms *notes and bills*, are sufficiently comprehensive to include all those, and possibly, also every other sort of promises to pay. The intention being clear to prohibit the issuance of notes and bills, it is not easy to conceive why the emission of bonds, and bills single should not be considered as a mere evasion of the statute, because the same consequences to the community would flow from either act.

But as the corporation, in a certain event, is authorised to give out its obligations for the payment of money, as well as prohibited from emitting them as a circulation, it follows that the intention with which the issue is made, must enter into every emission, and that the act is lawful, or unlawful, as the intention may indicate; neither the amount of the obligation, its shape, manner of engraving, nor indeed any other circumstance of a similar kind, will render the emission a matter of law, to be determined by the

court; but the intention must be ascertained by the jury upon a view of the circumstances; and the mere indebtedness of the corporation will not authorise it to emit bills intended for circulation, although they may be given in the first instance to the creditor. The least consideration will shew that if the emission is made to depend on the indebtedness, it would continue to be perpetual, as the old emission is a debt and could be replaced at any time by a new one founded on it.

Then, as to the effect or consequences of making an emission for the purpose of circulating as money; we waive all examination of how far the franchise might be affected by such a misuser, because that is not now the question; but as to the parties connected with the unlawful emission, whether the corporation or its creditors, I think it is clear, both upon principle and authority, that neither the act itself, nor any contract with respect to it, is of any force in law. [Cannon v. Bryce, 3 B. & A. 179.] If bills single then were emitted by this corporation, although in payment of debts actually contracted, with the intention that the same should circulate as money; and this intention was concurred in by the creditor, they were void in his hands, and could not by him be enforced against the corporation, for both parties would in such a case, be equally guilty of the violation of the statute. So likewise they would be invalid in the hands of any other persons to whom they should come for the same purpose, and with the same concurrence of intention to violate the law.

There are limits, however, beyond which this rule ought not to be applied, especially too, where, as here, the prohibition of the statute extends only to a particular act. It will be seen that this *proviso*, does not in terms inhibit the actual circulation of, or make void such paper as shall be unlawfully emitted; and we think that public policy, when the whole enactment is considered, does not require such a construction to be given. Paper of a description precisely similar, may lawfully be issued by the corporation under certain circumstances, if it be free from the intention to make it a circulation. Now public policy does not require that each individual who is disposed to deal for paper, which at least is lawfully negotiable, should be put upon an inquiry into the intention with which it was made, when under this statute, it may be lawfully issued under some circumstances. It is the emission by the corporation for circulation, which is prohibited, and the

sanctity of the law is sufficiently vindicated, by declaring the paper void in the hands of one immediately connected with the illegal act. The legislature too had not thought proper to prohibit the circulation of paper like this, when this transaction took place, nor are we authorised to say that it is so entirely valueless as to furnish no foundation for a suit in the hands of a *bona fide* holder, innocent of any connexion with the illegal act of emission, and perhaps even beyond this it may be considered as valid, if the immediate holder can trace his title as well as a legal consideration paid to a *bona fide* holder, who himself might have recovered, although the one to whose hands it ultimately comes, may have assisted or aided in the illegal issue of similar paper.

Another statute is supposed to have a material bearing upon a portion of the facts connected with this case, and must therefore be considered. It is the act of 1830, [Digest, 110, § 52,] which renders it unlawful for any person, or corporation to make any note, bill single, &c. for a less sum than three dollars, to subserve the common purposes of money, and punishes the making with a fine of not less than fifty, nor more than two hundred dollars; this statute also directs the punishment of those who pass off, circulate or aid in the circulation of any such note, bill single, &c., by a fine not less than five nor more than twenty dollars.

The rule of decision under this statute, is similar to the one we have just considered. Whenever a contract is made with reference to any matter which is in violation of a statute, the contract itself is void; but if the contract itself be innocent, and in carrying it into effect a violation of the law arises, either by ignorance or mistake, the contract remains good, although the offender may be punished for the violation of the law. To illustrate this rule: if a contract is made for the loan of money, without reference to the kind, and in payment such bills as are prohibited, are given and received for a part, the contract is not avoided, as it would be if even the smallest sum was contracted to be received in this prohibited kind of money. Indeed, it would be monstrous to hold that the payment of a prohibited bill upon a contract, without reference to such money, would avoid the security given for it. The rule is very fully illustrated in a variety of cases; thus, if a druggist sells drugs to a brewer, with the knowledge that they are to be used to adulterate beer, in violation of a statute, the contract is void, although it would be innocent in the ab-

sence of the knowledge of the one intended to be made. [Langlee v. Hughes, 1 M. & S. 593.] So, likewise, goods sold with the knowledge of the intention of the purchaser to violate the revenue laws.

Here, the contract was not made with reference to loaning bills of the Rail Road Company of any particular denomination, and it is shown that some of them was for greater sums than three dollars. There is no pretence that the contract was made with a view to the violation of this statute, and therefore, although the Bank may be liable for its violation, the contract is not for that cause, a void one.

It is also supposed that the contract by which this bill was purchased, is void as against the policy of the several acts creating Banks in this State; but this objection may be dismissed, with the single remark, that if the bills single, when held by the Bank, were available to it, and could then have been recovered from the Rail Road Company, they constituted a sufficient consideration for the purchase of the bills of exchange, for such a transaction is nothing but an exchange of one kind of paper for another. The question is not whether the Bank would be permitted to insist on the taking of the bills single, when the contract was for a loan of money, but is, whether it is lawful to exchange one lawful and valuable kind of paper for another, at the request of a party who seeks to be benefitted by that precise transaction. If the contract is free from difficulty on the other points, we think it is on this.

Having ascertained these principles, there is no difficulty in the conclusion, that the Circuit Court erred in the charge given to the jury, in reference to the first instructions which the plaintiff requested, inasmuch as it then undertook to declare the contract between the Bank and the Montgomery Rail Road Company, void, in point of law, from its inception. We have already shewn that this was a question to be determined by the jury under all the circumstances of the case. The contract of the Bank, in terms, only applies to such notes as the Rail Road Company should lawfully issue; and such it was lawful for the Bank to receive in payment of its debts; and, if it thought proper, to again put in circulation. But if on the contrary this contract was a mere contrivance to enable the Rail Road Company the better to evade the *proviso* by circulating its own bills as money, although

they might be paid out in payment of debts before contracted, this concurrence of intention, and aid in the unlawful act, would render this contract void. If, beyond this, it was shown that these bills single were put in circulation in violation of the statute, then it would devolve on the Bank to show that it received them from a *bona fide* holder, capable of maintaining a suit against the corporation issuing them.

The consideration already given this case will probably be sufficient for its correct decision, and therefore we omit the examination of those charges which were refused.

Let the judgment be reversed, and the cause remanded.

COLLIER, C. J.—I concur with my brother GOLDTHWAITE, in reversing the judgment of the Circuit court. But as it is unnecessary to determine whether bills or notes illegally issued could be collected by a *bona fide* holder, for a valuable consideration, without notice ; or whether one conusant of the illegal issuance, but receiving the bills or notes from a *bona fide* holder ignorant of the violation of law, may enforce payment, I decline an expression of opinion on these points.

ORMOND, J.—I concur in the judgment of reversal, with the reservation expressed by my brother COLLIER.

STEPHENS v. BRODNAX & NEWTON.

1. Where an order was made granting a new trial, on terms different from those on which it was asked, and which require their acceptance to be manifested by some act ; the prosecution of a writ of error by the party who prayed a second trial, amounts to a non-acceptance of the terms, and is consequently a waiver of the order.
2. Where it is stated in a bill of exceptions that a charge was prayed upon certain evidence, it will not be intended, in order to legalize the charge, that other evidence was adduced.

3. A person who has paid a note without the request of the maker, which he was not bound either mediately or immediately to pay, cannot recover the amount of the maker, in an action of *indebitatus assumpsit in his own name.*
4. It will not be inferred in the absence of proof, that where one person pays a debt for another, that he acts as the agent of the debtor, and advances his own money for him.

WRIT of Error to the Circuit Court of Lowndes.

This was an action of assumpsit, brought by the defendants in error against the plaintiff, as one of the partners in a late mercantile concern, doing business under the style of Jacob H. McMichael & Co. The declaration contains all the common counts; and the cause was tried by jury as on issue joined, (though there is no plea in the record,) and a verdict was found for the plaintiffs below for the sum of fifteen hundred and forty-nine 93-100 dollars; on which a judgment was rendered. Thereupon the defendant moved for a new trial; on which the following order was made: "The defendant assenting that the judgment may stand in full force for the amount, deducting eight hundred dollars, then a new trial is granted the defendant as to the amount so deducted, on his giving bond and security, payable to plaintiffs, to be judged of by the clerk, conditioned to pay the ultimate rendering which may be had against him. This new trial is to be confined to an entry in the account between the parties of $700 advanced the defendant." There is no evidence of record to show that the defendant executed the bond required by the order, or in any manner assented to a new trial on the terms imposed.

On the trial the defendant excepted to the ruling of the court. From the bill of exceptions it appears, that the plaintiffs, to sustain their declaration, offered in evidence two promissory notes, for one thousand dollars each, both dated "Lowndes county, May 10th, 1838," and payable nine months after date at the Branch of the Bank of the State of Alabama at Mobile, to Andrew Armstrong, cashier, or bearer. The one was made by James B. Stephens, James W. McQueen and Joseph M. Bullock; the other by Josiah McMichael, Drury A. Gaffney and William W. Cook. At the foot of both the notes were written as follows: "Credit Rugely, Harrison & Blair." "Upon this evidence the defendant requested the court to charge the jury, that the bare possession of these notes by the plaintiffs, without

proof of payment by them, of the same, at request of the defendant, was not sufficient to authorize a recovery against the defendant in this action; which charge the court refused to give, and charged the jury, that possession of a note by one connected with it as indorser, &c., was *prima facie* evidence of payment, but as to those not a party to the note, a payment without request, unless by an agent, would not authorize a recovery for money had and received, &c."

Cook, for the plaintiff in error.—The charge should have been given as prayed; it was warranted by the evidence, and the law is certainly as the terms, in which it was asked, supposes. The charge given was not called for, by the evidence; was calculated to divert the attention of the jury to matters entirely foreign and abstract; and is incorrect in itself in assuming that where an agent pays money for his principal, the legal inference is, that he pays his own money, and not that of his principal.

J. P. Saffold, for the defendant.—The writ of error should be dismissed. It appears from the record that a new trial was granted at the instance of the plaintiff in error, and the case is still pending in the Circuit Court; and if it were allowable to revise the judgment so far as it is in force, another writ of error might be sued out when the case is definitively disposed of. The inference is, that a new trial, with the conditions imposed by the Court, was accepted by the party who asked it.

The bill of exceptions is too vague and uncertain to show that the judge of the circuit court erred, either in giving or refusing a charge to the jury. The fair inference is, that there was evidence which is not set out. The notes may have been paid by plaintiffs below, at the request of one of the other members of the firm than the defendant; and unless the charge prayed had referred such an inquiry to the jury, this Court will not say that its refusal was erroneous. The propriety of a charge asked must appear from the evidence. [1 S. & Porter's Rep. 81; 3 Ala. R. N. S. 419.]

Error must be shown affirmatively: A bill of exceptions should not be uncertain, but should recite enough of the evidence to enable the revising court to see the pertinency of the legal points intended to be raised. [9 Porter's Rep. 195; Castles v. McMath,

1 Ala. Rep. N. S. 326; Stone v. Stone, ibid. 582; Schuessler v. The State, 3 Ala. Rep. 419; Norman v. Norman, 3 Ala. Rep. 389; Magee v. Billingsley, ibid. 680.]

A judgment will not be reversed for an erroneous charge, if it appear that no injury has resulted. [Porter v. Nash, 1 Ala. Rep. N. S. *supra*, 3 ibid. 680.] Conceding that the charge given was abstract, it is insisted, that it is in conformity to law. [5 N. H. Rep. 557; 4 Wend, Rep. 652; Chit. on Bills, 9 Am. ed. 593 n. 1; 4 Pick. Rep. 421; 12 Johns. Rep. 90; 3 T. Rep. 163–174; 5 Wend. Rep. 495; 1 Mason's C. C. Rep. 243; 17 Wend. Rep. 206; 2 Starkie's Ev. 301; 2 Pet. Rep. 318; 2 S. & Porter's Rep. 291.]

Possession of negotiable paper is *prima facie* evidence of property, where it is payable to bearer, or indorsed in blank. [3 Kent's Com, 51; 3 Burr. Rep. 1525; 2 S. & Por. Rep. 300, 318.]

One of the notes is signed by the plaintiff in error, and the other by one of his late partners; the inference is that they were paid at maturity by plaintiffs below, as the agents of Messrs. McMichael & Co.

Where a new trial is not a matter of right, it may be restrained to one point. [4 Chit. Gen. Prac. 79; 4 Taunt. Rep. 555.]

COLLIER, C. J.—1. From the order in relation to a new trial, we learn that the defendant did not object to a judgment against him for eight hundred dollars, not that he was willing to submit to a recovery for that amount and take the chances of a second trial as to the residue of the plaintiff's demand, either with or without the condition annexed by the court. If the plaintiffs would not consent to take that sum as the amount of the judgment, then he moved the court to set aside the verdict, that the cause might be re-tried *in toto*. The order made was materially different from that asked, and its efficacy must of course depend upon the acceptance of its terms; and this could only be manifested by the defendant's performance of the act required.

It is not shown by the record, that the defendant consented to accept a new trial on the condition imposed, nor will it be competent for him at any future time to avail himself of it. By prosecuting a writ of error on the judgment which was rendered, he affirms that it is still in force, and has elected to consider the or-

der, which is a conditional vacation of it in part, as wholly inoperative.

If the defendant had complied with the order of court, he could not have complained of any error which occurred at the trial. His assent to the judgment which would then have been rendered, would have divested the case of all legal objection, and been a virtual withdrawal of the bill of exceptions. And if it were allowable for him to avail himself of a new trial, if unsuccessful here, we should not hesitate to dismiss the writ of error.

The case of Dale v. Moseley, [4 S. & Porter's Rep. 371,] is unlike the present, upon the point we are considering. That was the trial of the right of property to two slaves. The jury found a verdict against the claimant, who moved for a new trial, which was granted as to one of the slaves, and refused as to the other. No act was required to be done by the claimant to entitle himself to a second trial, but the order was absolute: The court held that it was competent for the claimant to have refused a new trial, and to have brought up the entire case for revision, but having impliedly accepted it he could not prosecute a writ of error as to so much of the judgment as remained in force.

What we have said may be quite enough on this point; but as it is not entirely out of place, we would remark, that as a new trial is not a matter of right, the court granting it may annex terms to the exercise of its discretion, which the parties may accept or reject, according as one or the other may be required to act. Nor is the power of the court restricted to awarding a second trial of the entire case, it may, with the *assent* of the parties, direct the judgment to be rendered as to part, and a new trial to be had as to the other matters in controversy. Whether the court could stipulate with the party only, who makes the motion, that he shall have a new trial as to a part, if he allow a judgment to be entered as to the remainder, we will not undertake to say, as our conclusion might conflict with what was said *arguendo* in Dale v. Moseley. [See, however, Hutchinson v. Piper, 4 Taunt. Rep. 555.]

2. Whether the bill of exceptions sets out all the evidence adduced at the trial, or whether any, or what other evidence was offered, we have no means of judging. After copying the notes it proceeds as follows: "Upon this evidence the defendant requested the court to charge the jury, that the bare possession of

these notes by the plaintiffs, without proof," &c. The reasonable inference is, that there was no other evidence introduced pertinent to the matter of the charge prayed, or it would not have been asked upon the mere production of the notes. Thus interpreting the bill of exceptions, the question is, can a person who has paid a promissory note without the request of the maker, which he was not bound either mediately or immediately to pay, recover the amount of the maker in an action of *indebitatus assumpsit* in his own name. This question came directly before the court in Weakly v. Brahan & Atwood, [2 Stew't Rep. 500,] where the court say "it is a well ascertained rule of law, that one person cannot make another his debtor against his consent;" and where one man pays money for another without his request, he cannot recover it of the latter by action of *assumpsit* in his own name. This rule, of course, does not extend to purchases made of instruments which are so assigned as to vest the legal interest in the assignee. And where one purchases a demand not assignable, whether evidenced by writing or not, he may sue in the name of the person in whom the legal right was vested. Authorities are numerous to sustain the case cited. [Richardson v. McRay, 1 Const. Rep. 472; Mayor, &c. of Baltimore v. Hughes, 1 Gill. & Johns. Rep. 497; Turner v. Egerton, ibid. 433; Rensselaer Glass Factory v. Reid, 5 Cow. Rep. 603; Rumney v. Ellsworth, 4 N. Hamp. Rep. 138; Little v. Gibbs, 1 South. R. 213; Jones v. Wilson, 3 Johns. Rep. 434; Menderback v. Hopkins, 8 ibid. 436; Beach v. Vanderburgh, 10th Johns. Rep. 361; Overseers of Walkill v. Overseers of Mamataking, 14 ibid. 436.] Although money is paid for a third person, yet if the latter promise to repay it, the person thus advancing money may maintain an action of *assumpsit* for its recovery. In such case, the law either infers a previous request from the subsequent promise, or else supposes that the payment of money for another's benefit imposes a sufficient obligation in morals to sustain a promise, [Hassinger v. Solm, 5 Sergt. & R. Rep. 9; Shrewsbury v. Boylston, 1 Pick. Rep. 105.]

In this view of the law, it is clear that the charge as prayed should have been given to the jury. The absence of proof did not require the prayer to have been so framed as to ask the court to inform the jury, that a promise to pay would have authorised

the plaintiffs to sue; but it went far enough under the circumstances of the case.

3. There can be no doubt if an indorser, surety or any other person whose liability to pay a debt is accessorial, discharge it, but he may reimburse himself by an action against the principal debtor. [Shearman, et al, v. Akins, 4 Pick. Rep. 283; Hassinger v. Solms; *supra.* It cannot be inferred, in the absence of all proof, where one person pays a debt for another, that he acts as the agent of the debtor, and advances his own money for him.—There should be some proof of agency in such case; what will be sufficient we will not undertake to say. If the agency were established, whether there should be evidence to authorise the presumption that the payment was made with the agent's means, or whether the implication would be, that he was in funds of his principal, we need not determine. If there was an entire absence of proof on these points, to say the least, the charge to the jury was unnecessary.

This view disposes of the questions raised upon the argument; and the conclusion is, that the judgment of the Circuit court is reversed, and the cause remanded.

ESLAVA v. ELLIOTT, ADM'RX.

1. The entry of record in the Orphans' court, that administration of an estate has been granted, is conclusive to shew that all the prerequisites of the law have been complied with. In a suit therefore, against an administrator, he will not be permitted to contradict the record of the grant of administration to him, by proving that the bond required by law, was not executed until afterwards, and that the official oath was not then administered.
2. When an entry of record in the county court does not show the time when it was made, and the *date* is afterwards ascertained by a judgment *nunc pro tunc*, it is not admissible to contradict this date, by proving the dates of the entries on the same record, immediately preceding and succeeding it.

ERROR to the Circuit Court of Mobile.

Assumpsit, by the plaintiff against the defendant in error.

This cause had been before this court previously. [3 Ala. Rep. 568.] Upon being remanded the defendants pleaded a plea in the following words: "and the said Margaret Elliott, for a further plea in this behalf, says *actio non*, because she says, that at the time of the suing out of the plaintiff's writ in this case, she was not, and is not, the administratrix of said Elliott's estate, but that one Frederick S. Blount, was then, and is now the administrator *de bonis non*, of said estate, and this she is ready to verify. Issue was taken on this plea, and a verdict and judgment for defendant.

Upon the trial, the plaintiff gave in evidence to the jury, a certified copy of the administration bond of the defendant, bearing date the 27th March, 1839, and also a certified copy from the minutes of the Orphans' court, for Mobile county, in the following words:

"In the matter of the estate of John Elliott, deceased. } Orphans' court, Mobile county, December 26, 1841.

It appearing to the satisfaction of the court that an order granting letters of administration *de bonis non*, of the estate of John Elliott, deceased, on the 7th of March, 1839, was made, and that the clerk then neglected to enter said order on the minutes of the court. It is ordered that the same be now entered *nunc pro tunc*." The said order was made at the time it bears date, *exparte* on motion of the plaintiff's attorney.

The defendant gave in evidence, an entry on the minutes of the Orphans' court, which reads thus: "This day came Margaret Elliott, and applies for letters of administration on the estate of John Elliott, deceased, in place of Frederick S. Blount, resigned, which is granted, on her entering into bond with William R. Hallet and Robert L. Walker, her sureties, in the sum of twenty thousand dollars. Ordered, that Cornelius Rain, C. Hobbs and Abner S. Lipscomb, be appointed appraisers of the estate of John Elliott, deceased." This order was without date, but the date of the order preceding it on the same page was the 27th of June, 1839, and of the one immediately succeeding it, the 27th of May, 1839. The plaintiff objected to the evidence of these dates going

to the jury, but the court admitted the evidence, and the plaintiff excepted.

The defendant also offered one or more witnesses to prove that the administration bond, although bearing date 27th March, 1839, was not in fact then executed, and that the defendant had not taken out letters of administration until long after said date, and at a period subsequent to the bringing of this suit. To this parol testimony plaintiff excepted, but it was admitted by the court.

The court charged the jury, that if they believed from the evidence, that the defendant had qualified as administratrix before the bringing of this suit, they must find for the plaintiff, otherwise for the defendant.

The assignments of error present the matters of law arising out of the bill of exceptions.

ADAMS, for plaintiff in error.
STEWART, *contra.*

ORMOND, J.—The issue presented to the jury upon the informal plea in this case is, whether the defendant was administratrix at the time the writ was sued out.

The plaintiff, to maintain the issue on his part, offered a transcript of the record of the Orphans' court of Mobile county, showing a grant of administration on the estate of John Elliott, deceased, made to the defendant previous to the commencement of this suit. The letters of administration which the court grants are merely the evidence of the authority conferred on the administrator by the grant of administration, there is therefore no necessity, in a suit against the administrator, to prove that they have issued, but it will be sufficient to prove the grant of administration. [Elden, adm'r, v. Kendall, 8 East, 187, and Hosey, adm'r, v. Brasher, 8 Porter, 559.]

The statute on this subject, [Aik. Dig. 177,] makes the execution of the administrator's official bond, and his oath a prerequisite to the grant of administration; he cannot, therefore, in a suit against him be heard to say that these conditions, on which alone the grant can lawfully be made, have not been performed. By the grant of administration, he acquires the control over the personal property of the deceased, and it would be of most pernicious tendency if he could be allowed to dispute the validity of the act by which he obtains his title.

The evidence offered by the defendant was, that the official bond was not executed until after the time, when by the record of the county court, it appears the grant was made, and not until after this suit was commenced; and that letters testamentary had not *then* issued. This testimony, for the reason already stated, was improperly admitted, as its tendency was to prove the non existence of those acts, at the time of the grant, without which no grant of administration could lawfully be made, and by necessary consequence, to contradict the record.

It appears that when the grant of administration was made, the *time* when it was granted, was not inserted in the record of the grant in the county court. This omission has been rectified by a judgment of that court entered *nunc pro tunc*. Assuming, as we must do, in this case, that this judgment was regular, it is of the same validity as if the date had been inserted when the grant was made. The evidence, therefore, which the court permitted to go to the jury of the date and entry preceding, and of that following the entry of the grant to the defendant, was wholly inadmissible, as its direct tendency was to contradict the record. The inference intended to be drawn, and which doubtless was drawn by the jury, was that the date assigned to the grant by the judgment *nunc pro tunc*, was wrong, from its position on the records of the county court in reference to other entries on the same page. This was directly calling in question the truth of the record, and therefore inadmissible.

If the administratrix in this case had declined acting on the grant made to her, and had never exercised any control over, or meddled with the estate of the deceased, the question would be entirely different from that now presented. For the error of the court as shown in this opinion, the judgment must be reversed, and the cause remanded.

THOMAS v. WALLACE.

1 Where a deed is witnessed by three persons, two of whom reside out of the State and the other is dead, proof of either of the witnesses hand writing to the deed, is *prima facie* sufficient to allow it to be read to the jury.

2. A deed conveying slaves in trust for the uses "of the legal heirs of Margaret W, upon her body to be begotton; and in the case of the failure of issue of the said M. W, to revert, &c. The proceeds arising therefrom to be applied to the support of M. W, during her natural life, in case she shall have no children living, and at her death to revert, &c." vests no interest in M. W., so long as she has children living.

3. Under such a trust, the children of M. W, or their descendants are entitled to the use of the property, and the possession of the slaves by their father, is a possession by him as their natural guardian, and although it may have remained for more than three years without the assertion of title by the trustee, cannot be considered as a loan to the father, so as to bring the slaves within the influence of the statute of frauds, and make a purchase from him valid.

Writ of Error to the Circuit Court of Dallas county.

Action of detinue by Wallace, against Thomas, to recover a slave. Pleas, *non detinet* and the statute of limitations.

The suit was tried at the Fall term, 1842, when a verdict was found and judgment given for the plaintiff.

At the trial, the plaintiff offered a deed in evidence, made in October, 1825, by William Wallace, conveying the slave in controversy, as well as others, and also a tract of land to the plaintiff, upon a consideration, and upon certain trusts which will be stated hereafter. This deed purported to be witnessed by Joseph Walker, Joseph Graham and D. C. Graham, and it was shown that the two first named had removed from the State, and that the one last named, was dead. The only evidence then offered to prove the execution of the deed, was by proving the hand writing of the witness, D. C. Graham, and upon this it was admitted to be read to the jury, notwithstanding an objection from the defendant.

The consideration for the deed is therein stated to be the sum of one thousand dollars, paid to the grantor by the plaintiff, and also the natural affection borne by him to his daughter Margaret E. West, wife of Henry West and her issue. The title of the

slaves and of the land, is conveyed to the plaintiff, his heirs and assigns forever, and the trusts are raised by these words.

"In trust for the uses of the legal heirs of Margaret West, upon her body to be begotten; and in case of the failure of issue of the said M. W., then the land and negroes shall revert to the said William Wallace, if living; and in case of his decease, then to his legal heirs in legal proportions. The proceeds arising from the said land and negroes, are to be applied to the support of the said M. W., during her natural life, in case she shall have no children living, and at her death to revert to the said W. W., or his heirs. And it is the distinct understanding of the parties, that the said Henry West is not to have the aforesaid land and negroes or any part thereof, either in the life time of the said M. W., his wife, or after her death; and the proceeds of the property are alone to be applied to her use, and the use of her children begotten upon her body." The plaintiff also gave in evidence a copy of the will of the said William Wallace, which will was admitted to probate the 11th day of September, 1826, and is of the same date, and witnessed by the same persons as the deed of trust. This will contains this clause. "I have given my beloved daughter, Margaret E. West, wife of Henry West, her part of my property, in a deed of trust with, or to her brother George E. Wallace, for her use."

The plaintiff likewise proved that the slave in controversy, in the possession of the defendant, was one of the slaves named in the deed of trust, and that the plaintiff for a short period of time after the death of William Wallace, had an agent residing near the residence of West, who was authorised to interfere if it should be found necessary for the safety of the property; and that on one occasion, when the slave in controversy had run away and came to the agent, he was sent home by him. It was also proved that Mrs. West, at the date of the deed, was the mother of children, who were living at the time of the trial.

The defendant then gave in evidence a bill of sale of the slave, made him by Henry West, on the 25th February, 1837; also a relinquishment of all right and claim, made by Mrs. West, on the 7th of October, 1839, at which time she was a *feme sole* by reason of her husband's death.

He also proved that William Wallace died within a year from the date of the will, and that soon afterwards, the slave in contro-

versy, as well as other property, which previously to his death had belonged to the deceased, went into the peaceable and quiet possession of West, and that the slave so remained until the sale by him to the defendant. During the same perod of time West was possessed of considerable other property acquired by various modes. West claimed the slave as his own property and exercised over it the same general undisturbed right of ownership as he also exercised over all the other property, and received and appropriated the proceeds to his own use.

The defendant also gave evidence, showing that from the death of W. Wallace, until the institution of this suit, the plaintiff had no known agent within the State, except for one or two years, during the most of which short period, the agent was at a distance of 60 or 80 miles from the county of Dallas, in which West and the defendant then resided. That when the defendant purchased the slave, West resided fifteen or twenty miles from the place of sale, and the same distance also from the residence of the defendant; and that the plaintiff had resided out of the United States for a considerable portion of the time since the death of W. Wallace.

With reference to this state of proof, the court charged the jury, that if the deed of trust was executed and delivered by W. Wallace, *bona fide* to the plaintiff, then it conveyed the entire legal estate in the property to him so as to enable him separately to sue for it. That the trustee might, consistently with the deed, have permitted West and his wife, to have the possession of the slave in dispute, but had the legal right under the deed to withdraw that possession, when he saw fit, and if refused, to sue and recover at law. That if the possession of West was not adverse to the trustee, but with his consent then, in a controversy between the trustee and any one deriving title to the property mentioned in the deed of trust from West, or from West and his wife, the second section of the statute of frauds did not apply so as to require the deed to be recorded to enable the trustee to recover, although the deed be founded alone on natural love and affection. That if a controversey had arisen between a *bona fide* purchaser from West, and W. Wallace, or his representative, founded upon any reservation of interest at the making of the deed, then that section of the statute would require the deed and reservation to have been recorded. That the deed of trust, though it created an estate tail, did not vest the fee simple in Mrs. West, but in

her children, and that a conveyance by West, or by Mrs. West, after his death, of the trust property would have no validity as against the trustee. That if after the execution of the trust deed, W. Wallace had retained possession of the slave in controversy, and had conveyed it to West, and he so holding, had conveyed it to the defendant, then the defendant's title would be good against the trustee; but if West did not so acquire title, and the only title which defendant had proved, was derived through the bill of sale in evidence and the release by Mrs. West, and if the deed of trust was made *bona fide*, and delivered to the plaintiff, and if no disposition of the property, inconsistent with that deed had been made by W. Wallace, then the title of the plaintiff was superior to that of the defendant, and it was so, although West may have obtained possession, from the representatives of W. Wallace, nothing being said by them of the deed of trust, and although he had held the property under such delivery and used it as his own down to the time of his conveyance to the defendant. That if the defendant set up a title to the property in controversy, then the trustee could maintain this suit without a demand previously made, although the possession may have been peaceably obtained by West, and from him in the same manner by the defendant.

The defendant excepted to this charge, but did not state wherein, or as to what particular point, unless the particular instructions asked by him, can be so considered. He then requested the following instructions which the court refused to give.

1. That our statute law may have the effect to invalidate or avoid a deed of trust like that before the jury, for the want of registration against other claimants under it than the grantor, and his personal representatives who have suffered and permitted the quiet and undisturbed possession of the property to remain in another for the space of three years and more without demand made and pursued in due course of law, on the part of such claimant, when the person so in possession has sold and conveyed the property to a subsequent *bona fide* purchaser, for a valuable consideration, without notice of any kind, and when such subsequent purchaser has also remained in the undisturbed possession for more than three years; that such, at least, would be the effect if the jury should be of the opinion that the consideration of the deed was no other than natural love and affection.

2. That if the beneficial interest or use of the slave in question

is, under the deed of trust, an estate tail, so as to become an absolute interest in the part taken (as the court instructed the jury) then according to the provisions of this deed a part of the interest, at least, vested in Margaret West consequently, after she became a widow, she was capable of transferring some portion of that interest to the defendant.

3. That notwithstanding the deed of trust and the will of W. Wallace if the slave in question went into the peaceable and undisturbed possession of Mrs. West, and her husband, and so remained ten years or more, without demand made or suit instituted for the same, and if during all this time they claimed the property as their own, and exercised a general right of ownership and control over the same as such, and that then West sold and delivered the slave for a valuable consideration to the defendant, as expressed by the bill of sale, and the purchaser having no notice actual or constructive, of any adverse claim, and if afterwards Mrs. West, during her widowhood, duly executed her release, &c., to the defendant, as expressed, &c., for the consideration therein mentioned, the defendant having acted in good faith in each of the said transactions, then, under all these circumstances, some portion at least of the interest of the slave had vested in him, sufficient to deny the plaintiff a right to recover the same in this action of detinue, although there may have been no intentional fraud on the part of W. Wallace, the grantor in the deed of trust.

4. That if West and his wife, and the defendant under them, held peaceable and undisturbed possession of the slave for ten years and more, each of them having acquired the possession in the same (peaceable) manner, and during all that time such possessors respectively claimed the slave as their own, exercised over it a general right of ownership and control, and had received and applied to their own use all the profits and proceeds of its labor, though there may have been no intentional fraud on the part of the original grantor, Wallace, yet the defendant, if a *bona fide* purchaser for a valuable consideration, under the issues joined in this case, was entitled to a verdict.

5. That if, under all the circumstances, as stated in the instructions last requested, should the jury so find them, and also be of the opinion that the consideration for the deed of trust, was no other than natural love and affection, then they should find for the defendant.

6. That if under the circumstances stated in the two instructions last requested, the jury should further be of opinion that the plaintiff never had possession of the slave, as trustee or otherwise, nor ever claimed or exercised any authority or control over it, or over the profits or proceeds of its hire, but on the contrary, that West and his wife, after the death of W. Wallace, received possession of the slave, in the same manner that the other children of W. Wallace received possession of their respective portions of his property, as provided by his will, nothing being said in reference to the deed of trust, and that they thus remained in the peaceable possession for ten years and more, they all that time claiming the slave as their own, and exercising all the usual acts of ownership over it, and so continued in possession until the sale and release to the defendant, he being a *bona fide* purchaser, and without any notice, actual or constructive, of the deed of trust, or other adverse claim, then the jury should find for the defendant.

7. That under the circumstances of this case, should the jury believe the facts to be as hypothetically stated in the three last instructions requested, if the plaintiff could maintain an action against the defendant for the slave, it could only be by suing in his capacity of trustee, and not individually.

The court, in answer to the request to give the several charges above specified, instructed the jury thus:

That if the deed of trust was executed and delivered by W. Wallace to the plaintiff, *bona fide*, and if Mrs. West was his daughter, then, in a controversy between the plaintiff and any one deriving title from her or her husband, the not recording the deed would make no difference as to the rights of the parties.

That although the deed might create an *estate tail*, it did not do so in Mrs. West, so as to make her capable of transferring any title as against the trustee, in whom the whole legal title was vested by the deed, but that if, notwithstanding the trust, W. Wallace had retained the possession of the property, and during his life had given or sold it to West, and he so holding had sold it to the defendant, then the title of the latter would be good. But if West, and his wife, or either of them, obtained possession in virtue of the deed of trust, and held subject thereto, no matter whether derived from the representatives of W. Wallace, or from the trustee, then no time during which the property was so held, would bar the trustee, and this although during such time West

and his wife should claim the property as their own, exercise over it the usual acts of ownership, and then sell it to a *bona fide* purchaser without notice.

That if the only title relied on by the defendant was derived from the bill of sale by West, and the relinquishment of title by his wife when sold, and had not proved that West had obtained title from W. Wallace in his life-time; and if the plaintiff had proved that he held under a deed of trust made *bona fide* from W. Wallace, such as was adduced in evidence, then his title was superior to that of the defendant, and it was so, although the plaintiff might never have had the actual possession, and although he might have permitted West and his wife to retain the possession for the length of time shown by the proof, without demand made; and it was the same if West had received the property from the representatives of W. Wallace, under his will, nothing being said in reference to the deed of trust by them.

That it was not necessary that the plaintiff should have further disclosed by the pleadings his proceedings as trustee.

The defendant excepted to the proof, the deed, to the charges as given, and to the refusals to give those requested by him.—These several matters are assigned as error.

Saffold, for the plaintiff in error argued the following points:

1. That as there was no delivery of the property under the trust, and as it went into the possession of West without any notice of the deed, it must be considered as property distributed to him in right of his wife; or as a marital gift.

2. Conceding the deed to be valid as between the parties, yet it is void as to a purchaser from West, in consequence of the omission to register the deed as required by the statute of frauds.

3. That the trust estate is an *estate tail* in Mrs. West, and therefore the remainder over to her children, is void under the statute. Having then, the entire interest by the statute, she was competent to convey as she did after her husband's death.

GOLDTHWAITE, J.—1. We think the proof of the execution of the deed was entirely sufficient to authorise its admission as evidence. It has been often held, that one subscribing witness is sufficient to prove the instrument attested, though there are several. [3 Phil. Ev. 1262; 3 C. & H's notes.] The absence of

the subscribing witness beyond the process or jurisdiction of the court, is sufficient to let in inferior evidence. [Id. 1294.] And in such case it seems that proof of the hand-writing of the witness, without any further evidence, will suffice in the first instance, to allow the instrument to be read to the jury, though it is usual, for greater caution, to add corroborating circumstances. [Id. 1266.] In fact, the proof of the witness' hand-writing, has been permitted, though he himself denies or doubts it. [Id. 1303, 4, 5.] So, if a witness recognizes his signature, and says he has no recollection that the writing was executed in his presence, but seeing his signature, he has no doubt he saw it executed; this has always been received as sufficient proof of execution. [Id. 1304.]

From this view of the law, it may we think, be concluded, that the testimony of one of several attesting witnesses is competent to prove the execution of the paper, either by testifying positively to the fact, or by acknowledging his signature, where he remembers nothing more. This being the law, all the witnesses being either dead or removed (as in the present case,) it would seem that the proof of hand-writing of one was *prima facie* sufficient to allow it to be read to the jury.

2. Most of the other questions which have been argued on behalf of the plaintiff in error, are dependent upon the supposed interest of Mrs. West, under the deed of trust; and after a very deliberate examination, we have arrived at the conclusion that it was intended by the grantor that she should have none whatever; except upon a contingency, which does not appear to have yet existed.

It is proper to remark, that the deed has no dependence upon the will, which indeed, refers to it, but only as a valid subsisting instrument; and such undoubtedly it was, upon the authority of our previous decisions. [McCutchen v. McCutchen, 9 Porter, 650; McRae v. Pegues, *supra.*]

The intention evinced upon the face of this deed is entirely clear, and does not require the transposition or interpolation of any words to make it so. The deed declares two trusts; one of which is absolute, in favor of all the legal heirs of his daughter, born of her body; and the other, which is conditional, is in her favor, but is to have effect only when she is without children in being. With this idea of the grantor's intention, we will recite the operative words of the deed. "In trust, for the uses of the legal heirs of

M. West, upon her body to be begotten; and in case of the failure of issue of the said M. West, the above mentioned land and negroes shall revert, &c."

"The proceeds arising from the said land and negroes are to be applied to the support of the said M. West during her natural life, in case she shall have no children in being; and at her death to revert, &c."

The subsequent matter of the deed seems to have no influence whatever upon the trusts, but is declaratory of the grantor's intention that the property shall never be West's under any circumstances. The concluding declaration, that "the proceeds of the property are alone to be applied to her use and the use of her children;" must be confined to those uses as previously specified, which are, to her descendants, in the first instance, and to her only, when she has no descendants in being.

The proof before the jury showed, that during the whole period between the date of the deed and the trial, she had children living; consequently, there never has been a time when a court of equity would have given her either the use of the slaves or their proceeds. This circumstance, has been supposed in argument, one of much importance, because, (as insisted) if Mrs. West, at any time continuously for three years had been entitled to the use of the property, or even if the trustee had loaned it to her, the possession continuing with her for that period, would have made it subject to the creditors of her husband, or protected a purchaser from him. Without intending to decide what is the proper construction to be given to the statute, we shall refer to some decisions from other States, upon one precisely similar. [Guy v. Moseley, 2 Mum. 545; Lewis v. Adams, 6 Leigh, 320; Pale v. Adams, 7 ib. 80; Crenshaw v. Anthony, Mart. & Yerg. 102; Andrews v. Hartsfield, 3 Yerg. 39; Withers v. Smith, 4 Bibb, 171; Craig v. Payne, ib. 337; Chiles v. Bernard's ex. 3 Dana, 95; McLaughlin v. Daniel, 8 ib. 182; Strode v. Churchill, 2 Litt. 75; 1 Litt. 229; 1 Marsh. 7.]

3. Under the trust deed, the children of Mrs. West, or their descendants, are entitled to the use of the property, and therefore, when the trustee permitted their father to take and retain possession, it must be considered that he held it as their natural guardian; and this the more especially because the verdict concludes this point, for it was left to the jury to determine if West

held under the deed. In Seawell v. Glidden, [1 Ala. Rep. 52,] such a possession was held to be referable to the title of the child, and that the father's possession was in trust for him.

This in reality disposes of the case, by deciding the only question involved, and although some of the instructions, when given, as well as those refused, may be obnoxious to criticism, yet they do not affect the merits, for they become entirely abstract, under our view of the case.

Let the judgment be affirmed.

CARTER v. CASTLEBERRY.

1. The statute of frauds declares that every gift, conveyance, &c., of lands, &c., to delay, hinder, &c., creditors, or to defraud purchasers, shall be "utterly void;" and a subsequent *bona fide* purchaser, may impeach such conveyance, and show its invalidity, as well at law, as in equity.

WRIT of Error to the Circuit Court of Pike.

This was an action of trespass, brought by the plaintiff in error to try titles to, and recover the possession of several tracts of land situate in the county of Pike. The cause was tried on the plea of "not guilty," and a verdict found for the defendant, on which a judgment was rendered. At the trial, the plaintiff excepted to the ruling of the presiding judge. The bill of exceptions recites that one Shaw, had purchased the lands in controversy of the United States; subsequently thereto, a judgment had been rendered against Shaw, in the circuit court of Pike, and under a writ of *fieri facias* duly issued thereupon, the plaintiff purchased the lands at a sale regularly made by the sheriff. The plaintiff also produced the sheriff's deed, and proved the refusal of the defendant to deliver to him the possession of the land.

The defendant claimed title through Shaw, under a deed in fee from the latter to one Armstrong, executed previous to the rendition of the judgment. The plaintiff, then, to show, that the deed under which defendant claimed, should not defeat a recovery by him, proved several facts and circumstances (all of which are particularly stated in the bill of exceptions,) tending to show that the deed from Shaw to Armstrong, was fraudulent, and so intended by the parties thereto. In relation to this latter evidence "the court held, that though said deed might have been made to defraud creditors and purchasers, yet it could not thus, at law, be collaterally impeached by the plaintiff, and excluded all rebutting evidence; and the plaintiff excepted to the exclusion as error, and reserving his right to prosecute his writ of error, declined offering more evidence, and consented to a verdict for the defendant. And the plaintiff prays that the court may sign and seal this bill of exceptions, and make it a part of the record; and it is done." The bill of exceptions as certified, appears to be duly signed and sealed by the judge who presided.

Buford, for the plaintiff in error.

Belser, for the defendant. The bill of exceptions is insufficient to authorise a revision of the only question intended to be raised. [Aik. Dig. 254, § 5.]

All sealed instruments import a consideration, [15 Wend. Rep. 502; 21 ib. 166; 8 Cow. Rep. 290; 2 Johns. 177; 20 ib. 130.]

A purchaser at a sheriff's sale, obtains only such title as the defendant in execution had.

COLLIER, C. J.—The act of 1814, which was cited for the defendant in error, from Aiken's Digest, 254, only requires that the party supposing himself aggrived by the direction or decision of any judge against him, shall tender his bill of exceptions, stating the points wherein the judge is supposed to have erred; and the judge shall be bound to sign and seal the same, and the bill of exceptions so signed and sealed, shall be made and considered a part of the record in the cause. The bill of exceptions in the present case, states the point intended to be reserved with clearness, is signed and sealed by the presiding judge, and we think conforms to the statute.

The question raised in the circuit court, and on which the opin-

ion of this court is asked, is, can a subsequent *bona fide* purchaser for a valuable consideration, in an action at law, between himself and a previous fraudulent grantee, or the assignee of the latter, be permitted to show fraud in the previous conveyance? The second section of the act, commonly called the statute of frauds, expressly declares that every gift, grant or conveyance of lands, &c. made with the intent to delay, hinder or defraud creditors, or to defraud or deceive those who shall purchase the same lands, &c., shall be "clearly and utterly void." [Aik. Dig. 207.] This section is substantially a transcript of the 13th and 27th Eliz., which so far as we have recited our statute, have been always regarded as declaratory of the common law.

Fraud is looked upon as so polluting in its nature as to invalidate all instruments which are tainted with it; even the most solemn acts of courts of justice, if once shown to be infected by it, lose all their efficacy. It is true, that a fraudulent conveyance is binding upon the grantor, but authorities are ample to show that it may be avoided by a subsequent *bona fide* purchaser, although he may have notice of the previous conveyance: if he is informed of it, say the books, he knows that it is fraudulent, and of consequence void. And it is quite immaterial whether the subsequent purchaser acquire his title by a deed directly from the fraudulent grantor, or at a sale made under an execution against him. To these points, see Jackson v. Seward, 5 Cow. Rep. 67; Anderson v. Roberts, 18 Johns. Rep. 515; Evelyn v. Templar, 12 Johns. Rep. 536; Read v. Livingston, 3 Johns. Ch. Rep. 488; Roberts on Frauds, 596; See 4 Dana's Ab. 112, 13, 14, and cases there cited; Osborne v. Moss, 7 Johns. Rep. 161; Jackson v. Mather, 7 Cow. Rep. 301; Myers v. Peck's adm'r, 2 Ala. Rep. N. S. 648

The bill of exceptions does not show that the defendant set up a title in himself, nor was such assumed in the argument to have been the fact; we have therefore considered the case upon the hypothesis, that he is holding under Armstrong, the grantee of Shaw. And we are unable to perceive any reason why, if the deed could be avoided in equity, because the statute of frauds has declared it void, it is not alike void at law. The cases we have cited do not recognize any difference in this respect between the two jurisdictions, but maintain the competency of the law courts to give effect to the statute. From the view taken it results, that the judgment of the circuit court must be reversed, and the cause remanded.

JOSEPH, ADM'R V. THE LEGATEES OF JOSEPH.

1. No execution can issue on a decree of the County Court, rendered in favor of "the legatees of Philip Joseph," nor can a writ of error be prosecuted against them by that appellation, it not appearing in the record who the legatees of Philip Joseph are.

ERROR to the County Court of Mobile.

In this case administration was granted to the plaintiff in error by the County Court of Mobile, on the estate of Philip Joseph, with the will annexed, and having applied to the court for a final settlement, a decree was rendered against him for ninety-seven dollars twelve cents, "to be divided as directed by the last will and testament of the deceased, to the legatees therein named." At a subsequent term execution was directed to issue for the amount of the decree.

GIBBONS, for plaintiff in error.

ORMOND, J.—"The legatees of Philip Joseph," against whom, by that appellation, this writ of error is prosecuted, are not parties to this proceeding in the court below. It is true a decree is rendered in their favor, in those terms, but who they are, no where appears in the record. The statute requires the county court to render separate judgments in favor of each distributee or legatee, but the rendition of such a decree pre-supposes that they are parties to the proceeding propounding an interest, or at least that their interest should be made known to the county court, and until such separate judgments are rendered, no execution can issue.

It results from what has been stated, that the "legatees of Philip Joseph" are not parties to this record, and the writ of error sued out against them must be dismissed.

REID, ET AL. v. BIBB, USE, &c.

1. Where a sheriff collects money by the sale of perishable property levied on by an attachment, under an order made pending the cause; if the attachment is returnable to the circuit or county court, the clerk of the one court or the other, according as the fact may be (and not the officer making the order,) is authorised to institute a proceeding by notice, under the attachment law of 1833, against the sheriff and his sureties.

WRIT of Error to the Circuit Court of Montgomery.

This was a proceeding by notice and motion, at the suit of the defendant in error, against Reid and his sureties, for the failure of the former to pay over a certain sum of money collected upon a sale of perishable property, levied on by an attachment at the instance of the real defendant in error, against I. R. Thacker. The sale appears to have been made pending the attachment, under an order, or as it is designated in the notice and judgment, a *venditioni exponas*. In the recital of the notice in the judgment, the order is alleged to have been placed in the sheriff's hands on the 14th of May, 1840, while in the special verdict he is found to have received the money on the 17th April, 1840.

The jury found all the facts stated in the notice to be true, with the exception of the variance stated, and a judgment was rendered against the sheriff and his sureties in pursuance of the verdict.

CAMPBELL, for the plaintiff in error.
MAYS, for the defendant.

COLLIER, C. J.—By the eighth section of the attachment law of 1833, it is enacted that when any estate shall, on the oath of the plaintiff, his attorney, or other credible person, be certified to any judge, or justice of the peace, to be likely to waste or be destroyed by keeping, and if the person to whom it belongs, his attorney, &c., shall not within twenty days after the levy, replevy the same, then such estate shall, by the order of the judge or justice, be sold at public sale by such officer, &c. "And the officer shall, within five days after such sale, return the order of sale to

the court or justice to which the attachment is returnable, with his proceedings thereon, and also at the time of making such return, shall pay over into the hands of the clerk or justice, all money arising from such sale, which money shall be subject to the judgment on the attachment. Any officer failing to return such order of sale as above directed, shall be liable to like process of either the plaintiff or defendant, as officers are for failing to return writs of *venditioni exponas;* and any officer, who after the expiration of the time allowed for paying the proceeds of the sale, shall neglect or refuse to pay the same, on the demand of the clerk or justice, shall be subject to the like proceedings, at the instance of the clerk or justice, as officers are for failing to pay over money levied on a *fieri facias.*" [Aik. Dig. 39, 40.]

We learn from the record, that the attachment which was levied on the property sold, was returnable to the circuit court of Montgomery, and that the beneficial plaintiff in the present proceeding was the plaintiff therein; that the nominal plaintiff in the motion, is the judge of the county court, and the magistrate who made the order of sale. The first question brought to our view by the assignment of errors, is, who is the proper party to have moved against the sheriff, for the neglect or refusal to pay over the money arising from the sale. The act cited is exceedingly explicit in its terms. For a failure to return the order of sale at the time designated by law, the officer executing it is liable to be proceeded against, by notice and motion, at the suit of either the plaintiff or defendant, in the same manner, as if default had been made in returning a writ of *venditioni exponas.* If the attachment is returnable to a court having a clerk, and if the officer executing the order of sale, shall neglect or refuse to pay the proceeds on demand of the clerk, he shall be subject to a motion, at the instance of the clerk, to be governed by the same rules as are motions for failing to pay over money collected on *fieri facias.* And if the attachment be returnable before a justice of the peace, he is in such case invested with the authority conferred upon the clerk, where the suit is brought in a higher jurisdiction.

The summary proceedings against officers of court, are *quasi* penal, and the statutes which authorise them, cannot be extended by construction, so as to embrace parties and cases not provided for by them. There is no authority in the statute for the judge of the county court to have moved against the sheriff in

the case at bar, but that duty is enjoined upon another officer. Without considering the other objections made to the motion and special verdict, we are satisfied that the judgment is erroneous, for the defect noticed. The consequence is, that it must be reversed, and the cause remanded.

GAYLE v. TOULMIN.

1. On a bill filed to foreclose a mortgage, it appeared by the bill that there was a prior incumbrancer, who was not made a party; the answer denied the existence of the prior incumbrance, and alleged that it was discharged by payment before the filing of the bill, but demurred to the bill for want of proper parties: Held, that as the answer showed that the prior incumbrance was discharged, there was no necessity to make the prior incumbrancer a party, notwithstanding the allegation in the bill, but that a general demurrer to the bill without answer, would have been sustained.

ERROR to the Chancery Court of Mobile.

The bill was filed by the defendant in error, to foreclose a mortgage. The bill alleges, the sale of the land, and that three promissory notes were taken for the purchase, the payment of which was secured by a mortgage on the land. That the first of the notes was paid, the second is the property of the Bank of Mobile, and as well as the last, is unpaid, but does not make the Bank of Mobile a party.

The answer denies that the second note is due, but insists that it has been paid to the Bank before the filing of the bill, but demurs to the bill because the Bank was not made a party.

The court decreed a foreclosure and sale.

The error relied on was the failure to make the Bank a party.

STEWART, for plaintiff in error.

DARGAN, *contra.*

ORMOND, J.—The only error relied on, is the failure to make the Bank of Mobile a party to the suit.

There can be no doubt that a *prior* incumbrancer is a necessary party to a bill filed to foreclose the mortgage by a subsequent incumbrancer. The bill shows that the Bank of Mobile stands in that relation, and is not made a party to the suit, and if the defendant had demurred to the bill because the necessary parties had not been made, it must doubtless have been sustained. But the answer of the defendant shows that the Bank of Mobile has no interest in this controversy, because the note held by it on the defendant has been discharged by payment.

By our statute, the defendant may either demur generally, to the whole bill, or he may embrace the matter of the demurrer in his answer. The latter course has been adopted in this case, but we do not think the statute can receive such a construction as to give the defendant the benefit of his demurrer, when, by his own showing, the complainant is mistaken in supposing the Bank of Mobile stands in the predicament which would make it necessary that it should be a party to the bill. It would be mere trifling to sustain the demurrer, and send the case back to make the Bank of Mobile, a party, when it is shown not to have the slightest interest in the litigation.

This being the only error relied on to reverse the decree, it must be affirmed.

JORDAN, EX'R, ET AL. v. THE BRANCH BANK AT HUNTSVILLE.

1. Where the judgment in a summary proceeding, at the suit of a Bank against its debtor, recites that a notice and certificate were produced to the court, &c., it will be intended that the notice and certificate found in the transcript, were those on which the court acted.
2. The notice described a note payable to the order of J. C. W., by him indorsed to J. W. W., and by the latter to the Bank, while the judgment described the note payable to J. C. W., by him indorsed to J. W. W., and by the said J. C.

W., to the Bank: *Held*, that the recital in the judgment, that J. C. W., indorsed the note to the plaintiff, would be regarded as a clerical misprision, amendable by a reference to the notice.

3. Where the judgment refers to, and inaccurately recites the certificate of the President of the Bank, the certificate found in the transcript may be looked to for the purpose of correcting and supporting the judgment.

WRIT of Error to the County Court of Madison.

This was a summary proceeding by notice and motion, at the suit of the Bank, against the plaintiffs in error. The notice describes the indebtedness to be a promissory note made by Jordan, as executor of G. J. Weaver, for the payment of three thousand one hundred and fifty dollars, to the order of John C. Weaver, by the latter indorsed to John W. Weaver, and by him to the plaintiffs below. The judgment entry refers to the notice as being produced to the court in proof of notice to the defendants, and describes the note as having been made by Jordan, as executor, &c., payable to the order of John C. Weaver, "indorsed by the said John C. Weaver to John W. Weaver, and by said John C. Weaver to the said Branch Bank." The certificate of the President of the Bank is recited in the judgment thus "and Stephen S. Ewing, President of said Branch Bank, producing here in open court his certificate as President of said Branch Bank." The notice was executed on Jordan and John W. Weaver and against them only has judgment been rendered.

PARSONS, for the plaintiff in error.
MCCLUNG, for the defendants.

COLLIER, C. J.—1. In White, et al. v. The Branch Bank at Decatur, [1 Ala. Rep. N. S. 435,] it was determined that where the judgment recited a notice and certificate as having been produced to the court, it would be intended, that the notice and certificate found in the transcript were those before the court; and further, the recital was evidence that they had been acted on, and they might be here looked to as a part of the record. [See also Curry v. The Bank of Mobile, 8 Porter's Rep. 372.] The judgment, it is true, does not show that John W. Weaver is liable to the Bank, for it affirms that both the Bank and himself are the indorsees of John C. Weaver. But this statement in the judgment

when reference is had to the notice, which we have seen is allowable, must be regarded as a clerical misprision, and instead of John C., the reasonable intendment is, that John W. Weaver, who had become the proprietor of the note by indorsement of the payee, was the immediate indorser of the Bank. The notice being made part of the record, it is regular to refer to it, as where a declaration is filed in the ordinary course of proceeding; and in such a case it would be permissible to correct the recital of a judgment where the mistake was merely in a middle name, by looking back to the cause of action stated by the plaintiff.

2. The recital of the certificate of the President of the Bank, does not show, that it was such as the law required. It omits to state that the note was really and *bona fide* the property of the Bank; nor does it appear, that these words were substituted by others of equivalent import. The certificate which makes part of the transcript, is as follows: "I, S. S. Ewing, President of the Branch of the Bank of the State of Alabama at Huntsville, certify that the within described debt, is really and *bona fide*, the property of said Branch Bank, 24th February, 1842." The certificate is set out immediately after the notice, and appears to have been made thereon, and to refer to the note on which the parties are informed that a motion will be made against them. This being the case, the certificate sufficiently cures its defective recital in the judgment, and identifies the debt.

There is no error shown, and the judgment is consequently affirmed.

HOWZE, PLUMMER & CO. v. PERKINS, HOPKINS & WHITE.

1. Although a note is payable in the city of New York, yet if made and endorsed in this State, in an action against the endorser, the declaration must aver a suit against the maker, and return of no property found as the statute requires, or a sufficient excuse for not bringing such suit.

ERROR to the Circuit Court of Perry.

This was an action of assumpsit, by the defendants in error as endorsees against the plaintiffs in error, as endorsers of a promissory note made by King, Upson & Co. for $2,442 44.

The declaration charges the making of the note "in the State of New York, at to wit, in the county aforesaid," and that the makers "thereby and then and there promised to pay to the order of the said defendants, six months after the date of said note, at the office of Perkins, Hopkins & White, 126, Pearl street, New York, (meaning the city of New York in the State of New York,) twenty-four hundred and forty-two dollars forty-four cents; and the said defendants *then and there* endorsed the said note," &c.

The declaration proceeds to charge that at the maturity of the note, it was presented for payment at the place where it was payable, and that payment not being made, due notice thereof was given to the defendants, &c.

To this declaration there was a demurrer, which was overruled by the court, and the defendants pleading over, the jury found a verdict for the plaintiffs, upon which the court rendered judgment.

From a bill of exceptions, it appears that it was proved on the trial, that the note mentioned in the declaration was made by King, Upson & Co., in the State of Alabama, and also endorsed by the defendants in this State, whereupon the defendants counsel moved the court to instruct the jury, that unless suit had been brought against the makers of the note to the first court to which suit could have been brought, and an execution returned no property found, that the plaintiffs could not recover in this action; which instruction the court refused to give, but instructed the jury, that if demand had been duly and regularly made of said makers of said note, and regular notice given to the defendants of the failure to pay, it was sufficient to fix their liability. To all which the defendants excepted.

It was also in proof, that the house at which the note on its face was made payable, was a house in the city and State of New York, and that such instruments were negotiable by the law merchant in that State.

The assignments of error, are,

1st. The judgment of the court on the demurrer.

2d. The matter of the bill of exceptions.

GRAHAM, for the plaintiffs in error, insisted the declaration was not good against an endorser, under the statute of this State; that it should have averred either a compliance with the law of this State, by suit against the maker, or an excuse for not doing so, by an averment that the endorsement was made out of the State. The statement that the defendants "*then and there*" endorsed the note, he insisted had reference to the venue laid in the declaration, and not to the preceding averments.

But if wrong in that, he contended that as the evidence showed that the endorsement was made in this State, the law of the State must govern as to the diligence to be employed to charge the endorsers. He cited Story's Con. of Law, 262, § 316; 2 Kent's Com. 460; 5 Stew. & Por. 276; 9 Porter, 9; 1 Ala. 527; 2 ib. 397.

EDWARDS, *contra*, maintained, that as it did not appear from the bill of exceptions that the makers resided within this State, so that suit could be brought against them; it was not shown that the judgment was erroneous. That there was no evidence that the second endorsees had any knowledge that the first endorsement was made in this State, and that there must be many cases, notwithstanding our statute, as to the mode of charging endorsers, in which an endorser would be liable, without a suit against the maker.

That the contract of the makers, was to be governed by the place of performance, and that the endorsement may be made with reference to the place of payment of the note. He cited 2 Porter, 462; 5 Stew. & Por. 276; 9 Porter, 26; 2 Ala. Rep. 400; 13 Peters, 78; 2 Kent's Com. 459; 1 Ala. Rep. 527.

ORMOND, J.—It is well settled, that every endorsement is a new and substantive contract, governed by the law of the place where it is made. [Hanrick v. Andrews, 9 Porter, first case; Givens & Herndon v. The Western Bank of Georgia, 2 Ala. Rep. 397.]

To charge an endorser of an instrument, like the one described in the declaration, the statute of this State requires that the maker should be sued to the first court to which suit can be brought.

[Aik. Dig. 329.] In the exposition of this statute, it was held in Woodcock v. Campbell, 2 Porter, 456, that where the maker removed beyond the limits of this State, after the endorsement, that it was not necessary to sue him in the State to which he removed.

In Ivey v. Sanderson, [6 Porter, 420,] where the assignee took the paper at the time of the assignment, with a knowledge that the maker lived beyond the limits of the State, it was held that he could not recover of the assignor, without showing that he had employed proper diligence to recover the money from the maker, or that he was insolvent. To the same effect, is the case Bristow & Roper v. Jones, [1 Ala. Rep. 159.]

In this case, it does not appear from the record, where the makers reside, or if non-residents, whether they were so at the time the endorsement was made. Be the fact, however, of the residence of the makers of the note, as it may, when it was shown by proof, that the endorsement was made in this State, there could be no recovery on the declaration filed in the cause, as it neither averred a performance of those acts which are necessary to charge an endorser of an instrument of this character, or any excuse for failing to comply with the requirements of the statute.

The fact that the note was payable at a place beyond the limits of the State, does not vary the liability of the endorser, or supersede the necessity for the exercise of that diligence which the statute requires, to charge the endorser, if the maker resides within the State, and if resident beyond the State, the fact should have been specially averred as an excuse for the omission of the diligence exacted by the statute.

Nor is the case varied by the fact, that by the contract of the makers, the note is payable in the city of New York, and is there regarded as mercantile paper. The contract of the endorser is not to pay in the city of New York, but is a conditional undertaking to pay in Alabama, if the maker does not discharge the note, proper diligence having been employed to obtain the money from the maker. What shall constitute that diligence is regulated by statute, which declares that bills of exchange and promissory notes, payable in bank, shall be governed by the rules of the law merchant—that all other contracts for the payment of money, &c., shall be assignable as heretofore; that notice of non-payment shall be required only on bills of exchange, and notes payable in

bank, and that the endorser of paper, not mercantile under the act, shall be liable only where the maker is sued to the first court to which suit can be brought, and prosecuted to a return of "no property found." [Aik. Dig. 330.] The Legislature, by this act, has defined the liability of endorsers, and declared what class of instruments shall be considered as mercantile, and it would defeat the very object it had in view in the passage of the act, if the contract of the endorser was to depend on the character affixed to the endorsed instrument by the law of another State.

The court, therefore, erred in its charge to the jury, that the defendant was responsible on his endorsement on demand being made and notice given of the refusal of the makers to pay.

These views render it unnecessary to consider the propriety of the judgment of the court, on the demurrer to the declaration. If, as contended by the counsel for defendant in error, its true meaning is that the endorsement was made out of this State, and in the State of New York, it was contradicted by the proof, and the defendants below were entitled to a verdict; if, on the other hand, it showed that the endorsement was made in this State, it was bad because it did not aver the proper diligence as required by the statute, or show any excuse for not doing so.

Let the judgment be reversed, and the cause remanded.

LUCKIE v. CAROTHERS.

1. Where a commission directs the deposition of a witness to be taken on a day designated, within certain hours, and the commissioners certify, that pursuant to the annexed commission, they have caused the witness to come before them, between the hours therein stated, &c.: Although their certificate is not dated, it must be inferred, that the witness was examined on the day stated in the commission.

Writ of Error to the Circuit Court of Tuscaloosa.

This was an action commenced by attachment, by the defendant in error against the plaintiff, on an agreement to pay money for hogs previously sold by the latter to the former. The cause was tried on an issue upon the plea of *non assumpsit*. On the trial, the defendant excepted to the ruling of the circuit judge, in admitting to be read as evidence, at the plaintiff's instance, the deposition of Andrew Luckie, The deposition was taken under a commission, which directed the commissioners to cause the witness to come before them "on Tuesday the fourteenth day of September next, between the hours of 10 o'clock, A. M. and six o'clock, P. M. of that day." The commissioners certified, that "Pursuant to the annexed commission, we" &c. "have this day, between the hours of ten o'clock, A. M. and six o'clock, at," &c. "caused to come before us," &c. The commission is dated the 10th August, 1841, and is attached to the deposition. The deposition is not dated, though the certification of the commissioners concludes as follows: "In testimony whereof, we hereto set our hands, and affix our seals, the day and date above set forth."

Peck & Clark, for the plaintiff in error.—The deposition does not show that it was taken on the day authorised by the commission. [4 Wash. Cir. Co. Rep. 186–7, 715; 4 Missouri R. 465.]

Huntington and Moody, for the defendant.—The certificate of the commissioners, that the deposition was taken "pursuant, &c." shows, that the witness was examined on the day appointed by the commission for that purpose. [Sanford & Cleveland v. Spence, at the last term; 4 Johns. Rep. 130.]

COLLIER, C. J.—It is certainly true, that a commission to take a deposition is a special authority to the persons to whom it is addressed, which, in order to authorise the admission of the testimony, must appear by their report or certificate to have been pursued. The cases cited for the plaintiff in error, from Washington's Circuit Court Reports, affirm this to be the law, and nothing more. They do not determine, that it is necessary for the certificate to recite *in totidem verbis*, the special directions of the commission, and declare that they had been observed. The certificates in these cases were palpably defective in not showing,

either in general or special terms, that the commission had been regularly executed.

In the present case, the commissioners are directed to examine the witness on a day named in the commission; pursuant thereto they certify, that they have taken his testimony. It is immaterial which one of its appropriate meanings we attach to the word "pursuant;" it indicates that the examination has been made as the commissioners were required; that *under, in virtue of, in obedience to, &c.* they had called the witness before them. The commission required the witness to be examined on but one day; the commissioners say that they performed that duty pursuant to its directions, and if their certificate is to be accredited, it can mean nothing else than, that the commission was executed on the day designated. The case of Sanford & Cleveland v. Spence, at the last term, leads directly to this conclusion. In Bolte v. Wooten, [4 Johns. Rep. 130,] the commissioners certified that the witness had been examined in virtue of, and under the commission directed to them by name. The court said, "If the witness was sworn and examined under that commission, and that fact be certified by the commissioners, as acting commissioners, he must have been sworn and examined *by them.* There is no other meaning to be put upon the words. It is not a thing of inference, but equivalent to a direct averment of the fact."

This view is decisive to show, that the deposition was properly admitted, and the judgment of the Circuit court is therefore affirmed.

YARBOROUGH, EX'R v. WISE, ADM'R.

1. A husband having died without reducing into possession the share of his wife, in her father's estate, the executor of the wife's father, supposing the administrator of the husband to be entitled to it, paid it over to him, by whom it was paid away in the course of his administration, the estate of his intestate being declared insolvent. The executor of the wife's father having brought an action

to recover the money from the administrator of the husband, for money paid by mistake, in ignorance of the law: *held*, that he could not recover, as the money had passed from the hands of the administrator, before notice of the mistake, without the possibility of his reclaiming it.

ERROR to the Circuit Court of Chambers.

Assumpsit by the plaintiff against the defendant in error.

On the trial, it appeared in testimony, that the defendant's intestate married the daughter of the plaintiff's testator; that the plaintiff's testator, died, and also the defendant's intestate without having reduced into possession, the distributive share of his wife, in his father's estate. That plaintiff, under the belief that the defendant as administrator, was entitled to the share of his intestate's wife in her father's estate, paid it over to him, who applied the money in payment of a tract of land, contracted for by his intestate; that the estate has been declared insolvent, the land sold as part of the assets, and that the widow had agreed to take a part of its proceeds in lieu of dower, and it had been so assigned in lieu of dower.

The court charged, that upon these facts the plaintiff was not entitled to recover. To which the plaintiff excepted, and now assigns the charge of the court as error.

CHILTON, for plaintiff in error, cited 18 Wend. 319; 7 Paige, 137; 2 McCord's Ch. 455; 1 Hill's C. R. 251; Cook, 374, 467; 4 Littell, 125; 1 Edwards, 467; 1 Peters, 15; 2 J. C. R. 51; 1 Stew. 81; 2 Har. & Johns. 474, 500.

PECK, *contra.*

ORMOND, J.—This case has been argued in this court, and a reversal of the judgment asked, upon the ground that the money was paid under a mistake of the law, and that as the defendant, in right of his intestate had no claim to the money, it can be recovered back in this form of action. Conceding the general rule to be as stated, we do not think, under the circumstances of this case, there can be any recovery.

Assuming, as was doubtless the case, that the money was both paid, and received, in ignorance of the law, upon the supposition

that the representative of the husband was entitled to the distributive share of his wife in her father's estate, though he had not reduced it into possession during his life, the plaintiff cannot recover, unless the defendant can be placed it *statu quo.* If, as is shown by the facts of the case, the money has passed from the defendant in the course of his administration, and the estate is now insolvent, if a recovery is had against him, as he could not reimburse himself from the estate of his intestate, the loss must fall on him individully, whilst he is certainly not more to blame in receiving the money, than the plaintiff was in paying it over.

The principle which governs this class of cases is, that if money is paid by mistake to an agent, or stake-holder, so long as it remains in his hands, it may be recoved back, but if he pays it over before notice, he is not responsible, as it is not just that one man should lose by the mistake of another. [Burrough v. Skinner, 5 Burrow, 2639.] In Greenway v. Hurd, [4 Term. 553,] it was held, that an action would not lie to recover from a Custom House officer, duties which he had received after the act imposing them was repealed, and which, in ignorance of that fact, he had received and paid over.

A multitude of cases might be cited to the same effect, but the principle is too well established, to render it necessary or proper to encumber this opinion by adducing them. It does not appear in this case that the money was demanded from the defendant before it had passed out of his hands, without the possibility of his reclaiming it, and to permit it now to be recovered from him, would be in effect to punish him for the mistake of the plaintiff.

Let the judgment be affirmed.

SNELGROVE v. THE BRANCH BANK AT MOBILE.

1. Where process issues against A. S, and A. L, setting out their names at length, and is returned executed on S, merely stating his sir name, it will be intended that he is the person of that name designated in the process.
2. Where process issued to the sheriff of a particular county, and is returned executed by S. B, as sheriff, generally, the court will recognize him as the person of that name who is sheriff of the county.
3. In a summary proceeding, at the suit of a Bank, against its debtor, an appellate court will not look to the notice sent up with the record, for the purpose of contradicting the recital in the judgment, where there had been no contestation in the primary tribunal.
4. An allegation that a note was duly and regularly indorsed to the plaintiff, includes within itself an averment, that the paper was indorsed by the payee.
5. Where a judgment was rendered in favor of "The President of the Bank, &c." omitting the words "and directors," which were part of the corporate name; the omission is a mere clerical misprision, amendable at the costs of the plaintiff in error.

WRIT of Error to the County Court of Mobile.

The judgment entry in this cause, shows that this was a proceeding by notice and motion, at the suit of the defendant in error, under its charter, to recover the amount due on a promissory note, which had been discounted by the Bank. The notice was addressed to the sheriff of Wilcox, and is endorsed as follows: "Received the 7th May, 1841, executed May, 11th 1841, on Snelgrove; Samuel Burnett, sheriff, by S. Gregg, deputy." A judgment by default was rendered against the defendant, for the amount said to be due on the note, for principal and interest.

It is here assigned for error,

1. That the service of the notice does not sufficiently appear.

2. The notice describes a note dated the 15th May, while that recited in the judgment states the date to be the 13th May.

3. The note does not appear to have been endorsed by the payee to the Bank.

4. It does not appear that the motion for judgment was made on the day stated in the notice.

5. The judgment is not rendered in favor of the defendant in error by its corporate name.

STEWART, for the plaintiff in error.
MOORE, for the defendant.

COLLIER, C. J.—1. The notice in express terms, requires "Alfred Snelgrove and Aaron Livingston," to be informed that the plaintiff below, will move for judgment against them, and when it is returned, served on "Snelgrove," the conclusion of law in the absence of a plea, denying the fact, is that he is the individual of that name, who is intended by the notice. As to proof of the official character of Burnett, none is necessary. We have repeatedly held, that we must know without proof who are sheriff's &c., in the different counties of this State. If we were not judicially charged with this knowledge, the mere statement by a person returning process, that he was sheriff of a particular county, would be no evidence of the fact.

2. In the present case the judgment was rendered by default, and, as has been repeatedly held, in such cases, the notice, the office of which is to bring the defendant into court, and inform him what he is to answer, can only be looked to, when recited in the judgment entry for the purpose of curing defects. If the defendant would object to the cause of action set out in the notice he should appear and contest it; where this is not done, we will not allow the recital in the judgment entry to be contradicted by the notice, even if it could be done under any circumstances. In this view, it is entirely immaterial whether the second assignment of errors, is sustained by the record, as it is not available.

3. The record, after stating that the note was made by the defendant, and Andrew Armstrong was the payee, avers that it "was duly and regularly indorsed to the said Branch of the Bank of the State of Alabama at Mobile." Now, the indorsement could only be duly and regularly made by the payee, and the averment recited must be considered as equivalent to a special allegation that such is the fact.

4. It is stated in the judgment entry, that the defendant had thirty days notice, that the plaintiff "on this day, would move for judgment against him." Terms could not well be conceived more explicit to show, that the motion was made at the time indicated by the notice, even if it were essential to the regularity of the judgment that it should so appear.

5. The judgment, instead of being rendered in favor of the

plaintiff, by its corporate name, is, "*that the President of* the Branch of the Bank of the State of Alabama at Mobile, recover, &c." This is an irregularity, yet it must be regarded as a clerical misprision, not fatal to the judgment, but amendable under the act of 1824, "to regulate pleadings at common law," at the costs of the plaintiff in error. It has been repeatedly adjudged, that a judgment against an executor or administrator, *de bonis propriis*, is a mere misprision, and by analogy, we think the mistake in the present case cannot be considered more serious.

There is then, no error which authorises the reversal of the judgment, but it will be so amended as to be rendered in the corporate name of the defendant in error, and the plaintiff will pay the costs of this court.

RAVISIES v. ALSTON, TRUSTEE.

1. A deed conveying land and personal property in trust, to pay debts, cannot be used in evidence on the certificate of the clerk that it was acknowledged or proved to have been executed before him, but the fact of its execution must be established by proof *aliunde*.
2. A deed cannot be excluded by the Court, because of alterations or erasures apparent on its face.
3. A deed of trust conveying land, slaves, mules, plantation utensils, &c., also *corn, fodder and bacon*, giving to the trustee the management of the plantation during the current year, and devoting the proceeds thereof to the payment of the debts to secure which the deed was made, is not fraudulent *per se*.
4. The possession of the grantor, when consistent with the deed, is not a badge of fraud: after default, and when the property is liable to sale, such an inference will arise, but will be open to explanation.
5. After a sale of the trust property, and purchase thereof *bona fide* by the *cestuis que trust*, it is not a badge of fraud that they permit the grantors, who were their parents, to remain on the land.

ERROR to the Circuit Court of Marengo.

The plaintiff in error having obtained a judgment and execution against Samuel Pickering, which was levied on a negro, affidavit was made, and the property claimed by the defendant in error as trustee, and upon issue joined, the jury found for the claimant.

Pending the trial a bill of exceptions was taken, from which it appears that the claimant introduced a deed, dated 8th April, 1840, executed by the defendant in execution to the claimant, in trust, to secure certain debts therein mentioned, which was also executed by the trustee and the *cestuis que trust*. By the deed, the defendant in execution conveyed a considerable quantity of land and slaves, horses, mules, oxen, cattle, sheep and hogs, wagons and plantation utensils; also, fifteen hundred bushels of corn, one thousand pounds of fodder, and six thousand pounds of bacon, "and all the right, title, claim, and control of the crops to be raised the present year on the plantation on which he now resides, and hereby abandons all claim, right, title, and interest to the same, to the said trustees and their assigns."

It was further stipulated, that the maker of the deed should remain in possession of the property before mentioned, until the 1st March, 1841, and until he gives possession to the said trustees, after making default in the payment of the debts before mentioned. The debts secured by the deed were due and becoming due during the ensuing year, and on a considerable portion the beneficiaries of the deed were sureties.

It was "further agreed that if after selling enough to pay and satisfy the said William J. Powell and the said Richard R. Pickering, and the debts in which they or either of them are his securities, there shall be any of the property herein before mentioned left, it shall be and remain the property of the said Samuel Pickering, all the purposes of the trust being satisfied."

The deed was acknowledged before a justice of the peace by all the parties to it, on the 27th April, 1840, and recorded on the same day in the clerk's office of Marengo county court.

The claimants offered to read the deed upon the certificate of acknowledgment, without calling the subscribing witnesses; to which the plaintiff objected, but the objection was overruled, and the plaintiff excepted.

The plaintiff next objected to the reading of the deed, upon the ground that there were interlineations and erasures, apparent on its face, not shown to have been made before the deed was exe-

cuted, which the court also overruled, and the plaintiff excepted.

The plaintiff further objected to the reading of the deed, because by its terms, there was a substantial benefit reserved to the grantor, which rendered it fraudulent and void; which was also overruled, and the plaintiff excepted.

The proof at large, adduced upon the trial, conduced to show, that the debts secured by the deed were the *bona fide* debts of Samuel Pickering, and that these debts, upon which the *cestuis que trust*, his son and son in law were his sureties, had been taken up and paid off by them. That the deed conveyed the whole property of Samuel Pickering. That a short time after the law day of the deed, the property was exposed to sale by the trustees, which sale was open and fair, and at which the property sold at good prices. That at the sale, the *cestuis que trust* became the purchasers of nearly the whole property, real and personal. That the crop of 1840 was marked in the name of the trustees, sold by them, and the proceeds appropriated to the purposes of the trust. That Samuel Pickering and his wife were elderly persons, and that his wife, for about two years, had been in a bad state of health, and that he and his wife had resided on the premises from the date of the deed to the present time.

The counsel for the plaintiff requested the court to charge, that the fact of Samuel Pickering having resided upon the premises from the date of the deed continually to the present time, was one from which they might infer fraud in the deed, which charge the court refused, and the plaintiff excepted.

Judgment being rendered for the claimant, he prosecutes this writ, and assigns for error the matter of the bill of exceptions.

Peck & Clarke, for plaintiff in error, contended, that the deed was read without any legal proof of its execution,—[2 Ala. Rep. 203] and that it shoutd not have been read without proof that the erasures and interlineations were made before it was executed. [2 Wendell, 555.]

That the deed, upon its face, is fraudulent and void, because it secures to the maker a substantial benefit. [11 Wendell, 187.] Because it conveys perishable articles which are left in the possession of the maker. [4 Yerger, 541.] Because many of the debts secured by the deed, were past due when it was made, and

the maker was entitled to the possession of the property for nearly a year after.

The charge asked for should have been given by the court; the possession after the sale, was clearly a badge of fraud.

If the deed is void in part, it is void in *toto*.

LYON, *contra*, maintained that as the deed included lands, as well as personal property, it was properly admitted in evidence upon the probate. [Aik. Dig. 88.]

As to the objection on account of erasures, he cited 12 Viner's Ab. 58; 1 Peters, 369; 1 Dall. 67; 5 Har. & Johns. 36.

As to the objection that perishable property was conveyed, he denied that this was like the case cited from 4th Yerger. Here the profits of the farm were conveyed, and the provisions, corn, &c. was necessary to make a crop. He cited 11 Wendell, 240, as in point; also, 2 Johns. C. R. 579; Cowper, 566.

ORMOND, J.—The first question presented for our consideration is, whether the deed executed by the defendant in execution to the claimant, was properly admitted in evidence upon the certificate of its acknowledgment and probate, without calling the subscribing witnesses.

In Bradford v. Dawson & Campbell, [2 Ala. Rep. 203,] we held that the purpose of the act of 1828, requiring the registration of conveyances, made in trust to secure the payment of debts, was to give notice merely, and that when a deed so recorded was offered in evidence, it must be proved as any other written instrument. It is true the decision in that case was upon a deed conveying personal property only, but we are unable to perceive that that makes any difference. In all cases of this kind, the question of fraud is involved in the enquiry before the jury, and it is clearly the right of the creditor, not only to have the *fact* of the execution of the deed proved, but also the *time* when it was made, and all the circumstances attending its execution. It would be exceedingly difficult, and frequently impossible, for the creditor to unravel a fraudulent transaction, consummated by deed, if the *ex parte* proof of witnesses, or the *ex parte* acknowledgment of the grantor were *prima facie* evidence of these facts.

The counsel for the defendant in error relies on the act of 1803, [Aik. Dig. 88,] which makes the probate of the deed conveying

land, evidence of the execution of the deed, without further proof. The two acts are essentially distinct—the first provides for the registration of absolute conveyances—the second, for deeds conveying land on condition. The object of the act of 1828 is to prevent frauds, whilst the first was designed for notice merely. But the principal reason for the distinction we are making is, that the act of 1803 expressly declares that the probate certified by the proper officer, shall be received in evidence in any court, as if the deed were then produced and proved, whilst the act of 1828 is entirely silent on this subject, and in our opinion it would be going great lengths for this court to interpolate such an important alteration in the law of evidence, unless the objects on which the statutes were to operate, as well as the purpose to be accomplished by them, were identical. So far is that from being the case in this instance, that the manifest design of the Legislature, in the last enactment, would be frustrated by such a decision.—We are therefore clearly of opinion, that the deed was improperly admitted in evidence without proof of its execution, as well as proof of its registration, as the statute requires.

Although this point must reverse the case, as it has been argued on all the points presented on the record, it is proper that a decision should be made on them, that the case may be finally decided below.

The introduction of the deed was further objected to, because of interlineations and erasures apparent on its face. This objection cannot prevail. A deed is not necessarily void, though a material alteration may have been made in it after its execution, as it may have been done by consent of the parties, or may have been made before delivery. The effect, therefore, of an alteration or erasure upon the deed, depends on the proof of extrinsic facts, and cannot be determined by the court, on a motion to exclude the deed. Anciently, it appears, this matter was tried by the judges on a view of the deed, but now it is only triable by the jury. [1 vol. Shep. Touch. 69.] But in this case the parties to the deed make no objection to it, but admit its validity, and it is not easy to perceive on what principle a third person could object to it for that cause, unless indeed the erasures and interlineations were evidence of a fraud between the parties, to the injury of creditors.

It is further maintained by the counsel for the plaintiff in error,

that the deed is void, because it secures a substantial benefit to the grantor. It is very clear that a debtor in failing circumstances, cannot place his property, by an assignment or deed of trust, beyond the reach of his creditors, and yet reserve a portion of the property or an interest in the proceeds to himself. But such is not the fact here. The deed to be sure, provides, that if after paying the debts, to secure which the deed was made, there should be a residue, it should be paid to the maker of the deed. This provision is merely what would have been the legal effect of the conveyance, if no such stipulation had been made. The deed is not a general assignment for the benefit of all the creditors, but special for the benefit of a few, and after satisfying the purposes of the deed, the surplus, if any, would revert to the grantor by operation of law. A stipulation to that effect cannot, therefore, be fraudulent. [Johnson v. Cunningham, 1 Ala. Rep. 258.]

It is also contended, that as a portion of the property conveyed by the deed was perishable in its nature, such as corn, fodder, bacon, &c., and would be destroyed in its use, and as the possession of it was secured to the grantor for one year, and consequently the right to use it—that such a provision was fraudulent as against creditors, and vitiated the entire deed.

We do not doubt that a stipulation in a deed of trust, reserving property for the use of the grantor, which must be exhausted in such use, is fraudulent and void, and we agree entirely in the views taken by the Supreme Court of Tennessee, in the case of Somerville v. Horton, [4. Yerger, 550.] In that case, the articles attempted to be placed beyond the reach of creditors, and secured for the use of the grantor who kept a tavern, were whiskey, brandy, flour, wine, sugar, coffee, candles, wood, hay, &c. The court say, "the circumstances in this case, that the debtor must necessarily have used, and of course consumed the articles mortgaged, stamps this deed with a character not to be mistaken, as intended to cover the articles in a course of daily and rapid consumption from seizure by execution, until he could convert them to his own use, in supplying his house of entertainment."

It is only necessary to contrast that case with the present to perceive the difference between them. The property conveyed by this deed, consisted of land, slaves, mules, horses, plantation utensils, &c., with the right to sell and dispose of the crop to be grown during the current year, to pay the debts secured by

the deed. The corn, fodder, bacon, &c., were necessary to provision the plantation, and to the making of the crop, for which purpose, and not for the use of the grantor, they are reserved in the deed. It may also be remarked, that unlike the case cited from 4 Yerger, these articles although destroyed by the use, during the year, would not be converted into money, but would be reproduced by the cultivation of the plantation. How far it might be allowable to extend assignments of this character, or whether they could continue beyond a single crop, it is not necessary now to determine, but within that limit, and with the power given by statute to every creditor to pay the debt secured by the deed, and substitute himself to the condition of the preferred creditor, it does not appear to be liable to abuse.

The principle of the case of Cunningham v. Freeborn, [11 Wend. 240,] affords countenance to the view here taken. In that case, the conveyance was of work-shops, furnaces, &c., with the raw material, with power to the trustee to work up the raw materials, and sell the articles to be thus manufactured, to pay the debts secured by the deed, and the Supreme Court of New York, sustained the deed of assignment.

It is not a badge of fraud that the grantor remained in possession after the execution of the deed, as such possession was consistent with its terms, and the debts, or a considerable portion of them, to secure which it was made were not due. After default and when the property, by the terms of the deed, was subject to sale, such an inference would arise, but even then would be open to explanation.

Nor was it a circumstance from which fraud could be inferred, that the son and son-in-law of the grantor, who became the purchasers of the trust property at the sale, and who were the principal beneficiaries under the deed, permitted their aged parent, to remain on the premises, after such purchase. If the sale was fair and the purchase *bona fide*, the facts supposed, instead of being a badge of fraud, entitle the parties to commendation.

For the error of the court, in permitting the deed to be read in evidence without proof of its execution, the judgment must be reversed, and the cause remanded.

VAUGHN v. WOOD.

1. An absolute bill of sale was made of a slave, who was hired out for twelve months, more than half of which time was unexpired; the vendor retained possession for a year, or perhaps more, after the time of hiring—the vendee, repeatedly admitting that the greater part of the purchase money was unpaid, and that the vendor was entitled to the slave until it was paid: *Held*, that whatever might be the legal effect of the bill of sale upon the rights of the parties, the facts warranted the inference, that the vendor's possession was under a contract creating a pledge or lien.
2. The admission in a bill of sale, that the purchase money was paid, is not conclusive against the vendor, and will not be allowed to defeat a promise subsequently made for its payment, so as to invalidate a lien given to him.
3. Service of the writ is a sufficient demand in an action of detinue. It may be necessary to prove a previous demand, where the plaintiff seeks to recover damages from a day before suit brought.
4. Where there is conflicting evidence upon a point, no matter how strongly it inclines to a certain conclusion, the court should refer it to the jury to determine what it proves.

WRIT of Error to the Circuit Court of Shelby.

This was an action of detinue, brought by the plaintiff in error, against the defendant, for the recovery of a female slave, named Mahala, aged about twenty-two years, and her two infant children, the one about two years, and the other about one year old. The cause was tried on the general issue, and a verdict returned for the defendant, on which a judgment was rendered against the plaintiff for costs.

On the trial, the plaintiff excepted to the ruling of the presiding judge, in the refusal to charge the jury, and in certain charges given, as hereafter shown. The plaintiff introduced, and proved a bill of sale from Lucy Hester, to himself, dated the 10th February, 1839, in which she acknowledged to have received of him five hundred dollars in full payment for the slave Mahala, in consideration of which, she (in the language of the bill of sale) warranted and defended the title to Mahala, to him, to his heirs, &c., against herself and every other person. He also proved, that at the time the bill was executed, Mrs. Hester was the owner of the

slave, and that he paid her fifty dollars in paper, the remaining four hundred and fifty dollars she required in specie, which the plaintiff not then having, he agreed to pay in a short time.

Evidence was also adduced tending to show, that Mahala was to remain in Mrs. Hester's possession until the plaintiff paid her the balance of the purchase money; and that some short time after the execution of the bill, the plaintiff went to the defendant, who had hired the slave for twelve months, with a request or order, that he would deliver her to the plaintiff if he was willing to rescind the contract of hiring. But the defendant refused to accede to the request. On the 15th September, 1840, Mrs. Hester sent a letter to the plaintiff, by her brother, informing him, that the defendant was willing to give up Mahala, and urging him to come immediately and take her, and pay the money for her, or deliver up the bill of sale and receive his money back. A short time after this letter was written, the plaintiff came from his home in Coosa county, to the defendant's residence in Shelby, where Mrs. Hester resided, and presenting something to her in a bag or bags, said (in the language of one witness, "Aunt here is your money, count it." Two other witnesses, speaking of the same interview, stated that when the plaintiff presented the bags, he said to Mrs. H. that he wished, or expected her to take two hundred dollars that was coming to him from his grand-mother's estate, and the residue he would pay in specie; this was refused by her, and she in turn offered to refund him in specie, the fifty dollars, with interest, which she had previously received of him. A second interview was proved to have taken place the same day in which Mrs. H., proposed to receive the four hundred and fifty dollars in specie, and give up the slave; to this offer, the plaintiff replied by offering to pay two hundred and fifty dollars in specie, if she would take the residue in a claim on his grand mother's estate—but this she declined.

Mrs. H. retained the possession of Mahala, up to the time of her death, which occurred at defendant's house. The defendant offered to prove that he was executor of Mrs. H., by producing her will, and letters testamentary to him thereupon; this evidence was objected to by the plaintiff, but admitted by the court. *Further*, it was proved, that Mahala, was sold by the defendant as executor of Mrs. H., before this suit was brought; that the plaintiff exhibited his bill of sale and bid for the property, although

he first forbid it to be sold. *Lastly*, it was shown that the defendant had a knowledge of the facts which transpired in the interview between the plaintiff and Mrs. H., at his house. The value of the slaves in controversy, and the birth of the children since the bill of sale was executed, were shown. This was all the evidence in the cause.

The plaintiff's counsel moved the court to charge the jury, that the bill of sale by Mrs. H. to the plaintiff invested him with the absolute ownership of Mahala,—both the right of property and possession, and it was not competent to show, by parol proof, that the sale was conditional. This charge was refused by the court, who charged the jury, if they believed from the evidence, that it was the agreement of the parties at the time the bill of sale was executed, that the slave was not to be delivered until after the payment of the balance of the purchase money, then the bill of sale did not invest the plaintiff with the absolute ownership, and he had no right to recover possession until he paid, or offered to pay, the balance due upon the purchase.

The plaintiff requested the court to charge the jury, that the sale by the defendant was such a conversion of the slaves by him, as rendered a demand unnecessary to support the action. This charge was refused by the court.

The plaintiff also requested the court to charge the jury, that conceding the necessity of a demand, the exhibition by him of his title, and forbidding a sale, when the slaves were sold by the defendant, amounted to a demand in point of law. This charge was refused by the court, who charged the jury, that if they believed the sale from Mrs. H. was conditional, and that he had not made a legal tender of the residue of the purchase money, then, the defendant's possession of the slaves, as executor of Lucy Hester, was a lawful possession, and it would require a special demand with a legal tender of the balance of the purchase money to enable the plaintiff to maintain this action. And even if they believed the tender to Mrs. H. was a legal tender, yet as defendant was her executor, a special demand and tender was necessary to support the action against the defendant individually.

Moody, for the plaintiff in error.
Peck, for the defendant.

COLLIER, C. J.—The view which we take of this case renders it unnecessary to inquire what, in point of law, was the effect of the bill of sale made by Mrs. Hester, to the plaintiff, or rather, whether it transferred not only the right of property, but a right to the immediate possession. From the evidence recited in the bill of exceptions, it is apparent, (in fact not disputed) that the slave Mahala, was hired out at the time the contract was made; that Mrs. Hester, more than eighteen months thereafter, wrote a letter to the plaintiff, urging him to come and pay the purchase money and take her away; that the plaintiff, by his acts, as well as what he said, admitted the right of his vendor to retain the possession until four hundred and fifty dollars, due on the purchase, was paid or tendered. Now, even conceding that the bill of sale gave a legal right to demand the slave by suit, without the performance of any previous act on the part of the plaintiff, yet the permitting of Mrs. H. to retain her, and the admission of her right to do so, until the purchase money was paid, afford irresistible evidence, that Mrs. H. held her under a contract, creating a pledge or lien. Nor can it be objected to this proof, that it shows a parol stipulation, made contemporaneously with the bill of sale; for, even if it was then made, it was afterwards repeatedly acknowledged, and each acknowledgment may be regarded as giving validity to a contract, which in its inception, was binding, in morals, at least. [See Long on Sales, 188.]

The admission in the bill of sale, that the purchase money had been paid, is not conclusive against the vendor, and could not be set up in bar of an action brought for its recovery, much less can it be allowed to defeat a promise subsequently made for its payment, so as to invalidate a lien given to the seller. [See 2 Phil. Ev. C. & H's notes, 217, and 3 Id. 1441, and cases there cited.]

Proof of a demand of the slaves previous to the commencement of the suit, was not necessary to entitle the plaintiff to his action. The service of the writ is a sufficient demand in detinue, and it is only necessary on the general issue, to prove an anterior demand, to entitle the plaintiff to damages from a previous day. [Shepard's adm'rs, v. Edwards, 2 Haywood's Rep. 186; Tunstall v. McClelland, 1 Bibb's Rep. 186.]

The instruction then, prayed by the plaintiff's counsel, on this point, should have been given to the jury.

One of the witnesses examined at the trial, stated facts from

which a jury might have inferred a tender and refusal, viz: when the bag, or bags, said to contain the specie to pay Mrs. H. the amount due for the slaves, was thrown down, and she was requested to count the money, she refused to receive it. Now, the testimony of this witness, should have been disregarded by the jury, opposed as it was by the other witnesses, if they were equally respectable; and the evidence in respect to a subsequent offer to deliver up the slaves upon the payment of four hundred and fifty dollars, if credited, would have entirely done away the effect of a previous tender. Yet it was a question of fact for the solution of the jury, whether the tender was dispensed with, or made, or whether any, and which of the witnesses was entitled to the highest degree of credit, and the jury might have concluded that the tender was sufficient. It cannot be assumed, that the plaintiff has not been prejudiced by the charge, that a demand should have preceded the action, and was indispensable to its maintenance, for though the jury may have been satisfied that he made a tender, or was excused by the defendant's refusal made in advance, from making it, yet they would have been obliged, from the absence of proof of a demand, to find for the defendant. It is then clear, that the circuit judge committed a fatal error, in instructing the jury, that evidence of a fact, not at all material, should have been adduced to entitle the plaintiff to their verdict.

We regret the necessity of reversing the judgment in this case, as justice has probably been done between the parties. But we have no discretion in the matter.

The judgment is reversed, and the cause remanded.

BETHEA v. McCOLL, ET ALS.

1. Where slaves and other property were given to infants by deed, and one of the conditions of the gift was, that the donees were to keep the negroes and other property together, in the possession of their mother, for their use and benefit, until the youngest came of age—*Held*, first, that the mother was thereby created a

trustee, to appropriate the avails of the labor of the slaves to the maintenance of the infants, the father being insolvent: Second, that as the infants had no land to cultivate, it was proper in the mother to provide land for that purpose, and that the trust fund was not the crops made by the slaves, assisted by others which the mother procured, nor the price of the hire of such slaves, but the actual value of the labor of the slaves: Third, that to ascertain the trust fund, an account must be stated annually, charging her with the value of the labor of the slaves, and giving her credit for a reasonable sum, for her care, attention and labor in the supervision of the slaves, also for the board and clothing of the children, and for all monies expended in their education, and for medical attention during sickness. That if the balance of the account thus stated, was against her in any one year, she might carry it forward to succeeding years, when the balance might be in her favor, but could not lessen the principal of the trust fund, without first obtaining an order from the chancellor.

Error to the Chancery Court at Cahawba.

The bill in this case was filed by the defendants in error against the complainant and wife, for an account of certain slaves and other property, conveyed to them by the plaintiff in error, by the following deeds:

Know all men by these presents, that I, Tristram Bethea, of the district of Marion, South-Carolina, in consideration of the friendship and intimacy, love and affection which I have and bear unto John McColl, Solomon S. P. McColl, Daniel T. McColl, Philip B. McColl, and Tristram B. McColl, minors and sons of Daniel T. McColl, and also for divers other good causes me thereunto moving, have given, granted, &c., to the above named John, &c., the following slaves and other property, viz: Tina, a negro woman slave, Edmund, a negro man, and Matilda, a negro girl; also one horse, one mare, and cart, two feather beds, two counterpanes, eight white sheets, four bed covers, two bed quilts, and four pair of blankets, to have and to hold the said negro slaves, and other property, unto the said John, &c. to the only proper use and behoof of the said John, &c., their heirs and assigns, against me the said donor, my heirs and assigns; all of which said negroes and other property, I, the said Tristram Bethea have put the said donees in possession of, by the delivery thereof. And I the said Tristram Bethea, as one of the considerations of the grant, require the said donees to keep the said negroes and other property together, in the possession of their mother, Margaret McColl, for the use and benefit of the said donees

until Tristram, the youngest, shall arrive at the age of twenty-one years. In testimony, whereof, &c.

TRISTRAM BETHEA, (Seal.)

Upon the same day the plaintiff in error executed another deed in all respects like the preceding, and with the same condition, by which he conveyed a negro slave named Henry, to Tristram and Philip B. McColl, two of the donees previously provided for.

The bill alledges that the said property came to the possession of the mother of the complainants; that their father soon after died, and subsequently the plaintiff in error married the widow. The bill also charges various acts of mismanagement of the trust fund; that the trustee has exchanged one of the slaves for another, and taken the title in her own name; that with the proceeds of the fund she has purchased a tract of land and two negro girls, and taken the titles in her own name; that the trustee and her husband claim the property as their own, refuse to educate them, &c.; with other charges of a like nature.

The prayer of the bill is for an account, and the appointment of another trustee. John and Philip, two of the donees, have departed this life, and the bill is filed by the remaining three, two of whom are minors.

The plaintiff in error, the husband of the former Margaret McColl, answered the bill, admitted the execution of the deeds, the design of which, he insists, was to provide for a destitute family, and to protect the property from being taken for the debts of Daniel T. McColl, who was insolvent. He insists that the labor of the slaves was not more than sufficient to support the family; that the slaves and land were purchased by the industry and economy of the trustee, aided by him; that the children were supported and educated, &c. from the labor of the slaves.

The mother of complainants has not answered the bill; a decree *pro confesso*, was taken before the register for the failure of the defendants to answer, but was afterwards set aside.

The chancellor referred the cause to the master to state an account, which he accordingly did, finding that the eighty acres of land and the two slaves mentioned in the bill were purchased with the proceeds of the trust fund; that the trustee was indebted to the general trust fund $1916, and to Tristram McColl individually. $187 75; for which a decree was rendered.

Many exceptions were filed to the master's report, which were

overruled, but need not be here set out, as they are explained in the opinion of the court.

The assignments of error, are,

1st. Mrs. Bethea has not answered, nor is there any decree *pro confesso* against her.

2. Administration should have been granted on the estates of John and Philip McColl, and their legal representatives, parties to the bill.

3. The trustee was not liable to an account for profits before the youngest child came of age.

4. In overruling the exceptions to the report.

5. The bill should have been dismissed.

Williams, for plaintiff in error.

N. Cook, *contra.*

ORMOND, J.—The deeds under which the complainants derive their claim, convey to them a clear legal title in the slaves, and other property included in them. The clause which requires the donees to keep the property in the possession of their mother, for the use and benefit of the donees, excludes the idea that she had any interest either in the property itself, or its avails, and has the effect ascribed to it by the chancellor, of making her a trustee for her children. The effect of the deed cannot be varied by the subsequent declarations of the grantor. If there was a mistake of the drafts-man in drawing the deed, by which it was made to indicate an intention different from that contemplated by the grantor, it could be reformed in a court of chancery. That the intention was not truly expressed in the deed, rests on the assertion of the grantor, in his answer, unsupported by proof. It is also open to the objection that he has now an interest adverse to the complainants, having married their mother. But independent of this consideration, the deed cannot be impugned except by clear and satisfactory proof that by mistake it was incorrectly drawn, and thus made to speak a language different from that intended by the grantor. No such proof being made the deed must be its own interpreter; and that, in plain and intelligible language, declares that it was made for the use and benefit of the children; the mother not being named at all, except as the depository of the property, until the youngest child becomes of age.

This being the legal effect of the deed, the argument of the counsel for the plaintiff in error, that the mother of the complainant's could not be called on to account for the proceeds of the property of the infants in her hands, for their support, cannot be maintained.

In general, a father is required to maintain his children, if of ability to do so, although they may be entitled to property in their own right. [Butler v. Butler, 3 Atkins, 59; Darley v. Darley, ib. 399.] Formerly, it appears to have been considered, that even where the fund was expressly given for the maintenance of the child, the father, if of ability, must, notwithstanding, educate and support him. [Andrews v. Partington, 3 Bro. C. C. 60.] But that rigorous rule has since been, if not departed from, at least modified, and the court will, in general, direct the trust fund, to be employed as directed by the donor, without reference to the ability of the father. [Hoste v. Pratt, 3 Vesey, 729; Sesson v. Shaw, 9 ib. 285; Fairman v. Green, 10 ib. 45.]

All the cases, however, agree, that where the father is not of ability to maintain his child, the fund may be thus appropriated. In this case, the father was insolvent, and therefore there can be no doubt that the children must be maintained from the profits of the estate devoted by the grantor to that purpose.

The property thus set apart for the support of those five children, was four slaves, two males and two females, two horses, a cart, and some inconsiderable articles of household furniture, and it would not, under good management, seem to be more than sufficient for that purpose. But the children insist that it was, and that large profits have been made from it beyond their maintenance; and although the suit wears rather an ungracious aspect, it is their right to insist on a settlement of the trust.

What is the character of the trust? The donees are required, as one of the *considerations* of the grant, (*conditions* doubtless being meant) to keep the slaves and other property in the possession of their mother, for their use and benefit, until the youngest became twenty one years of age. The primary object then was the maintenance of the donees; to secure that result the entire property was to remain in the possession of the mother until the youngest was of age. It was obvious that the slaves could be of no value, unless employed at labor, and it seems equally clear that the donor did not contemplate that they should be hired out.

It was then the services or labor of the slaves, under the supervision of the mother, from which a fund was to be raised for the support and education of the children, and as the children had no land which the slaves could cultivate, it must have been contemplated that the mother should procure land for that purpose, and it appears that she did. By the bounty of the donor, she was furnished with land, the assistance of other slaves, and aid in money, to enable her to cultivate it. It is not alleged in the bill, nor does it appear from the proof that this was a donation to the children, but appears to have been designed as an aid to the mother, whose husband was insolvent, and died soon after the deed was made.

It is very clear, from this statement, that the trust fund was not the crops made by the joint labor of the four slaves, and others procured by the mother, on land to which the children had no claim, but it was the actual value of the labor of the four slaves. To convert the mother, who was acting pursuant to the trust, and entitled to the possession of the slaves, into a hirer of the slaves, would be doing her the greatest injustice. It is notorious that the hiring of slaves for agricultural purposes, is generally ruinous to the hirer, and not unfrequently also, injurious to the owner. By being treated as the hirer of the slaves, she would doubtless be a considerable loser, and although she cannot be a gainer by it, it is very clear that she cannot be subjected to a loss while she acts in conformity with the trust, which she appears to have done.

The master has ascertained the fact to be, that two negro girls Betsey and Charlotte, and a small tract of land were purchased by the mother with the trust fund. He attains this conclusion from the proof of witnesses, that they were purchased with monies arising from the sale of crops made by the trustee, and that she had no other means. The fund here considered by the master as the trust fund, was the joint product of the labor, not only of the four slaves, before mentioned, but also of others furnished by the plaintiff in error, with occasional hired slaves, with plantation tools furnished by the plaintiff in error, and also land upon which the crops were made. As already stated, the trust fund was the actual value of the labor of the four slaves, and the state of the fund could only be ascertained by stating an account, charging the trustee with the amount of such value, deducting therefrom the expense of clothing, feeding, tax, and medical attendance, of

any of the slaves ; and giving her credit by a reasonable sum for her labor and attention in the supervision of the slaves, also for the board and clothing of the children, and for all monies expended in their education, also for medical attendance during sickness, and if during a long protracted illness extraordinary attention was necessary, she would have the right to make a charge for it. If the balance of the account thus stated annually, was against her, it would constitute a part of the trust fund, for which she would be responsible. If the balance was in her favor, she might carry it forward to succeeding years, when the balance might be against her, but she could not be permitted to lessen the principal of the trust fund, without first obtaining an order of the chancellor to that effect.

The ascertainment of the value of the labor of a slave, is a matter of some difficulty, as it depends upon the ability of the slave to perform labor—the quality of the soil upon which it is employed—the skill with which it is directed—and the price of its product; but we think a sufficient approach to certainty may be made in this case, by taking the opinion of well informed planters acquainted with the facts. It may be added, that this appears to be the only practicable mode which can be resorted to in this case, and we hesitate not to say that the account should be stated with liberality towards the trustee.

The general principle is undoubted, that a trustee cannot make a profit for himself by the employment of the trust fund, and if it be used in the purchase of property, the *cestui que trust* may, at his election, take the property thus purchased, unless it has come to the possession of a *bona fide* purchaser without notice of the trust. So also, if the trust fund be invested in trade, the trustee must account for the profits. [Taylor v. Plumer, 3 M. & S. 575; Spencer's adm'r v. Whitaker, 3 Porter, 297. See also the authorities collected by Lewin on Trusts, 201, 4; and 2 Story's Equity, 503, 7.]

As already stated there was no evidence before the master authorizing him to conclude that any property had been purchased with the trust funds by the trustee. As it regards the land it is shown that a considerable portion of the purchase money was advanced by the plaintiff in error.

In regard to compensation to the trustee, it may be proper to remark, that the English rule, that trusts are honorary, and the

trustee not entitled to compensation for his labor, time and trouble, has never prevailed, at least, in its full extent, in this State. It is the universal practice to allow executors and administrators a commission, as a compensation for their loss of time and trouble in executing the trust, And in the case of Spence v. Whitaker, [3 Porter, 327,] this court sanctioned the allowance of a reasonable compensation to the trustee for his time and trouble. So in Green v. Winter, [1 J. C. C. 37,] Chancellor Kent, while admitting the binding force of the English rule, as to commissions, allowed the trustee four dollars a day for his time and expences.

We can see no reason for making any distinction in the account between the period of time which elapsed before the marriage of the mother of complainants with the plaintiff in error in 1836, and the subsequent time. As by that act a control was given over the property, not contemplated by the deed, it might have been a sufficient reason for removing her from the trust, but until that was done she must be considered as trustee, with all the responsibilities and immunities which attach to her office under the deed, her husband being jointly responsible with her for her acts.

As the case must go back, it is also proper to state that it was erroneous to decree a transfer of the land which Mrs. Bethea held in her own right, as she had never answered the bill, nor was there a decree *pro confesso* in force against her. There was no necessity to take out letters of administration upon the estates of the two brothers who died during infancy. The survivors were their heirs at law, and as they had no capacity to contract debts, cannot be presumed to have any creditors.

It results from this examination that the chancellor erred in overruling the exceptions to the master's report, and his decree is therefore reversed, and the cause remanded, that an account may be stated conformable to this opinion.

BUTLER & ALFORD v. O'BRIEN, SURVIVING PARTNER.

1. A bond given by the claimant of property levied on by attachment, payable to the sheriff, instead of the plaintiff, and the condition of which is not as extensive as the statute requries, is good as a common law bond; a surety in such bond is consequently an incompetent witness for the claimant.
2. On the trial of the right of property, levied on by attachment, to which a claim has been interposed under the statute, the plaintiff need not produce any other proof of indebtedness than the attachment affords.
3. Where a creditor receives of his debtor, a note which a third person gave to the latter on the purchase of goods, if the creditor was cognizant of the consideration of the note, when he became its proprietor, or retained it as his own, after he acquired such knowledge; in neither case, will he be allowed to show that the sale of the goods was fraudulent, with the view of subjecting them to the payment of his debt.

WRIT of Error, to the Circuit Court of Tallapoosa.

The defendant in error and his partner, since deceased, caused an attachment to be issued against the estate of Salem C. Garrett, returnable into the circuit court of Tallapoosa; which attachment was levied on a stock of merchandize, to which the plaintiffs in error interposed a claim, in the manner prescribed by the statute, with a view to a trial of the right of property, and executed a bond with William C. Morgan and John W. Butler, their sureties, payable to the sheriff of Tallapoosa, which bond is dated on the 20th December, 1837, conditioned to pay to the plaintiffs in attachment "all damages, which the jury, on the trial of the right of property, may assess against them, in case it should appear that such claim was interposed for the purpose of delay." At the term of the circuit court, holden in the spring of 1838, a motion was made to dismiss the claim of the plaintiffs in error, on the ground, that it was not regularly presented, across which, as noted on the motion docket, a memorandum was written as follows: "Motion discharged, on giving sufficient bond." The claimants executed a bond, bearing date the 5th of April, 1838, together with the same sureties who joined in the first, payable to the plaintiffs in attachment, conditioned to "have the goods, wares and merchandize forthcoming to answer the judgment of

the court, if the same shall be found liable to the attachment, and pay and satisfy all such costs and damages as shall be recovered for putting in the claim for delay."

A third bond is found in the transcript, bearing date the 1st day of April, 1839, payable to the sheriff of Tallapoosa, and executed by the claimants, with John W. Butler, L. P. Alford and John Morgan, as their sureties. By what authority this bond was filed in court, it does not appear.

The cause was submitted to a jury upon an issue made up to try the right of property in question, who found the same, subject to the attachment which had been levied thereon, and estimated the value of each article of merchandize separately. In addition to which, they found that the claim had been interposed for delay, and in consideration thereof, assessed the plaintiffs damages at one hundred and fifty-nine 64-100 dollars, "that being eight per cent upon the amount of the plaintiff's judgment on his attachment." On this verdict a judgment was entered condemning the property to the satisfaction of the plaintiffs attachment as well as for the recovery of the damages with costs.

On the trial, the claimants excepted to the ruling of the presiding judge. From the bill of exceptions, we extract the following as the points therein presented for the decision of this court.

1. The claimants offered William C. Morgan as a witness, who was objected to by the plaintiffs, because he was a surety of the claimants in their claim bond, which bond was the one first above recited. The claimants then produced the bond thirdly above recited, which appeared by the sheriff's indorsement thereon, to have been approved by him. There was no evidence how this bond came into court; the clerk could not tell, but did not believe it was ever received by the court. The memoranda made at the Spring term of 1838, which has been already stated, was produced, and on this state of facts, the claimant's counsel asked the court to permit the witness to testify, but the court decided that he was incompetent; and thereupon the claimants excepted.

2. The attachment and indorsement thereon of the levy were produced, but no judgment or other proof of the plaintiffs demand was shown. It was shown, that at the time of the levy, the goods were in possession of the claimants, and that the sheriff had summoned the claimants to answer as garnishees. Upon this state of facts, the claimants counsel asked the court to charge

the jury, that the issuance of the attachment and levy, was not sufficient evidence of an indebtedness by the defendant in attachment to authorise the plaintiffs to recover. This charge was refused, and the court charged the jury, that the attachment and levy was sufficient to authorise the trial of the right of property; and thereupon the claimants excepted.

3. The claimants then proved, that a note executed by them to the defendant in attachment, in part payment of the goods levied on, was, after the issuance and levy of the attachment received by one of the plaintiffs in attachment, in part payment of their debt against him, and that it was subsequently transferred by the plaintiffs to one Thornton, as collateral security for a debt due by them to him. It was further proved, that the makers of the note were insolvent. Upon this evidence, the claimants counsel asked the court to charge the jury; *first*, if they were satisfied from the evidence, that the plaintiffs received the note of claimants which they had given to the defendant, in part payment for the goods in controversy, in payment of the note of the defendant, due to them for the same goods, with a knowledge of the circumstances under which the claimants made the note to the defendant, that the plaintiffs must be considered as having recognized the sale of the goods, made by the defendant to the claimants, and were estopped from insisting upon its invalidity on the ground of fraud. *Second*, if the jury believed from the evidence, that the plaintiffs received from the defendant in attachment a note made by the claimants for the goods in controversy, not knowing what was its consideration, but after being informed of it, retained the note without any offer to return it, then their recognition of the contract between the claimants and defendant in attachment will be presumed, and they, the plaintiffs, cannot be allowed to show that it is fraudulent. These charges the court refused to give, but charged the jury, that in determining whether the plaintiffs, in receiving the note in question from the defendant intended to affirm the contract of sale, between the claimants and defendant, they might consider the taking of the note by the plaintiffs from the defendant, also the retaining it by the plaintiffs with other circumstances of the case, and also might inquire whether the plaintiffs, when they thus received the note in question, intended to affirm the contract between the claimants and defendant; or whether the taking or retaining the same, was for the better secu-

rity of their debt. To the refusal to charge as asked, and to the charge as given, the claimants, by their counsel, excepted.

Gunn and Belser, for the defendants in error. Morgan was a competent witness, and should have been permitted to give evidence for the claimants. The bond first executed by the claimants, and to which the witnesses name appears, is not good as a statute bond, because it does not conform to the act of 1828. [Aik. Dig. 169, 171; 1 Ala. Rep. N. S. 611; 2 Id. 203, 378.] It is not good as a common law bond, because taken, without legal authority, to the sheriff instead of the plaintiff in attachment. [2 Ala. Rep. N. S. 144, 204.]

If the last bond to the sheriff, is to be regarded as regularly in court, it is clear that it superseded the first, and the witnesses competency is unquestionable.

The plaintiffs in attachment should have established their debt by proof, as they had not recovered a judgment; otherwise they might defeat the contract between the claimants and defendant without making out an indebtedness to them, and this, although the contract, even if fraudulent, would be valid between all persons but creditors. [See 3 Mason's Rep. 378.]

If the plaintiffs in attachment received of the defendant in part payment of a demand against him, a note which the claimants had made to the latter in payment of the goods in controversy, they, (plaintiffs) must be taken to have affirmed the sale, if they acted with a knowledge of the facts. And the several charges prayed upon this point, should have been given to the jury, and that given is erroneous. [2 Stew't Rep. 479; 5 East's Rep. 449; 4 Mass. Rep. 502; 12 Pick. Rep. 307; 4 Greenl. Rep. 306; 4 Maine Rep. 364; 1 Hill's Rep. 305.]

The judgment is irregular in not showing the amount of the judgment in attachment, if any has been rendered; and for any thing appearing it may be less than the value of the goods condemned to its satisfaction.

Stone, for the defendant. Even admitting that the first bond was taken pursuant to the statute of 1828, yet it is good at common law, and this will be sufficient to disqualify Morgan as a witness. [2 Stew't Rep. 509; 2 Porter's Rep. 493; 6 Id. 414; 1 Ala. Rep. N. S. 316; 3 Id. 593.] The bond dated in 1838, is in

proper form, is executed by Morgan, and should be considered as regularly in court.

The bill of exceptions should show the pertinency of the charges asked and refused. [2 Stew't Rep. 38; 1 Stew't & P. Rep. 71; 2 Porter's Rep. 29; 1 Ala. Rep. N. S. 517; Id. 582.]

COLLIER, C. J.—Although the transcript contains a bond in due form, executed by the claimants and William C. Morgan, yet as this bond was not brought to the view of the court, when the latter was offered as a witness, we must consider the question of his competency upon the evidence of interest which was then shown to the court. In respect to the bond which was found in the file, bearing date in 1839, it must be placed entirely out of view, as it contains no intrinsic evidence of its having been sanctioned by the court, and the statement of the clerk affords a strong presumption that the reverse is true. Taking the bond then, which was executed simultaneously with the assertion of a claim of property by the plaintiffs in error, as the only source to which he can refer to ascertain the relation in which Morgan stands to the parties who introduced him; the question is, had he an interest so direct in the result of the suit as to render him incompetent.

By the eleventh section of the attachment act of 1833, it is provided that property levied on by that process may be claimed, and bond given to try the right of the same as in other cases, on which the same proceedings may be had as in trials of the right of property taken by virtue of a *fieri facias*. And the bond for the trial of the right of property shall be lodged with the clerk, &c.; and should it become forfeited, the fact shall be indorsed thereon, and an execution issue against all the obligors therein, &c. The statute of 1812, provided for the trial of the right of property levied on by execution, where it was claimed by a third person, and required the claimant to execute two bonds; one of which was to be conditioned as is the first bond executed by the claimant in this case, and payable to the sheriff; the other was conditioned for the forthcoming of the property. The act of 1828 modified the law in this respect, and requires but one bond, embodying the conditions of both the others, which is payable to the plaintiff.

It is conceded that the bond brought to our notice does not conform to the statute, but is variant in being made payable to the

sheriff, and conditioned to perform but one of the obligations required. There is then no pretence for regarding it as a statute bond, and the question is, can it be enforced at common law. In Hooe v. Tebbs, [1 Mumf. Rep. 500,] it was held, that a prison bounds bond, which was made payable to the plaintiff instead of the sheriff, and consequently void as a statute obligation, was notwithstanding, good at common law. And in Morse v. Hodsdon, et al. [5 Mass. Rep. 314,] the plaintiff in replevin gave his bond, with security, conditioned to prosecute his suit to final judgment, and recover the said goods; else the bond to be in full force. The condition prescribed by statute was, that the plaintiff should prosecute, and also make return, and pay damages, if judgment be against him. In an action of debt upon this bond, it was determined that as it was voluntarily given, and the statute entitled the obligors to relief against the penalty, on the payment of the proper damages, they were no more prejudiced than if the condition had conformed to the law; and not being declared void either by common law, or statute, the bond was good. [See also Justices v. Smith, 2 J. J. Marsh. Rep. 473; Hoy v. Rogers, 4 Monr. Rep. 225; Cobb v. Curtis, 4 Litt. Rep.] We might add many citations, tending to the same conclusion, but we will content ourselves with referring to the case of Sewall v. Franklin, et al. [2 Porter's Rep. 493] in which the court, after noticing many authorities, says, "it appears that bonds taken by civil officers, and in relation to judicial proceedings, though without the authority of our statute, (like bonds between individuals under other circumstances,) if they appear to have been given on valid and sufficient consideration, such as is neither illegal or immoral, may be good as common law bonds."

From these authorities it appears, that the bond in question, if the condition is forfeited, may be put in suit, and a recovery had against all the obligors. It is an undertaking on their part to pay all damages and costs which may be adjudged against the claimants; and each of them is interested in preventing such a judgment. The interest is not indirect and remote, but is direct, and an immediate consequence of a verdict and judgment adjudging the property subject to the plaintiff's attachment. Morgan then, according to the familiar rule, which declares one an incompetent witness who is interested in the event of the suit, was properly excluded by the circuit court.

2. It has been repeatedly held, where a third person claims property levied on by execution, and executes a bond for the trial of the right, that he shall not be permitted to object to the regularity of the judgment and execution, and that the plaintiff shall not be required to produce any evidence of the justice of his demand, other than the execution affords. We think the same rule must apply, where instead of an execution, the property is seised by an attachment. The only question to be litigated is, whether the goods claimed really belongs to the claimant or not, as against the plaintiff, a creditor; for the purposes of this controversy, the plaintiff must be regarded as a creditor without the production of proof of indebtedness. The eleventh section of the attachment law, in providing for the trial of the right of property, and directing the same proceedings to be had as where a claim is interposed upon the levy of a *fieri facias*, together with the decisions which have been made touching the nature of such a controversy seem to us to show, not only that such evidence is unnecessary, but irregular.

3. It may be considered as a settled principle of law, that a transaction fraudulent, and consequently liable to be defeated by those who are prejudiced by it, may acquire validity by their subsequent confirmation with a knowledge of the facts. The approval need not be direct and express, but it may be implied from the manner of the dealing of the parties. In the present case, if the plaintiffs received of the defendant in part payment of the debt they are seeking to recover, a note which the claimants gave the latter for the goods in controversy, having at the time a knowledge of the consideration, they would be held to have approved the sale. The bill of exceptions does not recite any express proof of knowledge of consideration, but it states that the plaintiffs, after the levy of their attachment, received by the defendant in part payment of their debt against him, a note which the defendant had received of the claimants for the goods in controversy. The court when called on to charge that the plaintiffs must be held to have recognized the sale as valid, if they knew for what the note was given, does not treat the prayer as asking an instruction upon an abstract point. And although the evidence of knowledge by the plaintiffs is not as full as it could perhaps be desired, yet we think it such as warranted the charge prayed on this point. It cannot be supposed that every person who becomes the assignee of a

note or other security for money, *eo instanti*, is informed of its consideration ; but in the case before us, the plaintiffs acquired the note, after their attachment was levied upon the goods, and the claimants had asserted the right to them as purchasers of the defendant. These are facts upon which the jury might inquire of the plaintiffs knowledge of the inducement to give the note.

While the plaintiffs could not, consistently with reason, be considered as affirming the sale, unless they knew that the note was induced thereby, so on the other hand it would be exceedingly unjust if they possessed such knowledge, to allow them to appropriate the note to their own purposes, and also condemn the goods to pay the residue of their demand. If the sale of the goods was fraudulent, and intended to delay, hinder, &c. creditors, &c. the plaintiffs would subject them to their demand, unless they have impliedly sanctioned it ; and the note would be recoverable in any court, as the law does not allow the fraudulent vendee to urge his own fraud in such a case.

Although the plaintiffs may not have been apprised of the consideration of the note at the time they received it, yet if they retained it as their own, and used it after they acquired such knowledge, the same consequences result as if they acted upon previous information. The question of the recognition of the sale does not depend upon the plaintiffs intention not manifested to others, but is a question of law deducible from the facts, which the jury may ascertain. From this view it results, that the circuit court erred in the refusal to charge the jury as requested, and in the charge given.

The judgment is consequently reversed, and the cause remanded.

CUMMINGS & COOPER v. McCULLOUGH, ADM'RX.

1. The acts of 24th January 1829, of the 10th January 1831, of the 18th January 1832, of 10th January 1835, and of the 25th December 1836, extending the time for the registration of deeds, are registry acts merely, and were not intended to repeal, modify, or change the act of the 11th January 1828, for the prevention of frauds.
2. Deeds of assignment of property in trust to pay creditors, are embraced by the terms of the act of 11th January 1828.
3. A conveyance by a father-in-law to a son-in-law, of one half a lot for the consideration, as expressed in the deed, of twenty-nine hundred and twenty-five dollars, but the true consideration, the note of a third person, then past due, which was transferred by delivery merely, and has never been collected, the deed being made two days before the execution of a deed of assignment of the property of the father-in-law to the son-in-law, as trustee, and with a knowledge of his insolvency—held, fraudulent and void as to creditors.
4. Where a deed conveyed to a trustee, all the real and personal property, *choses in action*, &c. of the grantor, in general terms, and without any description or schedule, except three slaves described by name, for the payment of creditors, to some of whom a preference is given, but only one specified by name, and no list of their names or of the amounts due them, nor any provision for the creditors to become parties to the deed, or notice to be given them, and no notice in fact given—held, that although neither of these facts singly, or even all taken together, might be conclusive evidence of fraud, that they raise the presumption of fraud, subject to explanation by the other facts attending the transaction.
5. The retaining possession by the grantor, of a portion of the trust property for more than three years, is a badge of fraud, which is not explained by an alleged contract of hiring, set up in the answer, the terms and conditions of which are not given, and nothing appearing to have been received; nor is it a sufficient excuse for failing to sell the property, that it was reserved from sale that it might appreciate in value, a portion of the property, being slaves of from near forty to seventy years of age.
6. The title to real estate sold by order of the county court, remains in the heirs of the deceased, until the court decrees a title to be made to the purchaser, and the title is in fact made, notwithstanding the court may have approved the bond given with surety for the purchase money.
7. Although a deed of assignment may be declared fraudulent and void, at the instance of a creditor, the title of purchasers of the trust property from the trustee previous to the filing of the bill and without notice of the fraud, will be protected; and the trustee in the settlement of the account will be entitled to a credit for all payments to the creditors of the assignor made previous to the filing of

the bill, from the proceeds of the *choses in action* placed under his control by the assignment.

8. Where the allegation of the bill was that a deed was not made upon the consideration expressed in it, or the consideration *bona fide* paid, or secured to be paid, held, that the answer stating that the consideration of the deed was the note of a third person, six months past due, which was transferred by delivery to the grantor, and was then by them *considered good*, was not responsive to the allegation, the deed expressing a monied consideration.

ERROR to the Chancery Court at Tuskaloosa.

This bill was filed by the defendant in error, to vacate, for fraud, a deed made by the defendant Cummings, to defendant Cooper, on the 19th January 1839; and also a deed made two days afterwards by the former to the latter, conveying all the property, real and personal, *choses* in action, &c. of the grantor, in trust for the payment of the creditors of the assignor.

The bill charges that the complainants intestate died in 1837, possessed of considerable real and personal estate, leaving his widow and three heirs at law. That one McGuire, was appionted administrator, who petitioned the Orphans' court of Tuskaloosa, for an order to sell the real estate of the deceased, which was granted, and in January, 1838, the real estate, consisting of two parts of lot 162 in Tuskaloosa, were sold to defendant Cummings, for twenty-three hundred and fifty dollars, to be paid in three equal instalments, for which he gave three promissory notes with surety The sale was confirmed by the court, but no title made to Cummings, at his request. That suits were brought and judgment recovered on each of the notes, and executions issued thereon, returned no property found.

That at the sale of the personal property, Cummings also became a purchaser, for which judgment was also recovered against him and his sureties, for seven hundred and sixty-nine dollars seventy-two cents, and execution returned no property found. That Cummings, at said sale, became the surety of one Young, for the purchase money of a slave, upon which judgment has been obtained for six hundred and ninety-one dollars twenty-five cents, and execution returned *nulla bona*. That all of said judgments remain unsatisfied, and that none of the defendants thereto, have any property which can be reached at law, and that complainant was appointed administrator, *de bonis non*.

That at the date of the notes, Cummings was possessed of a large real and personal estate, and engaged in business as a merchant tailor. That a part of said real estate has been sold to one Clare; a part to defendant Cooper, and a part to Hale & Eaton, that a large part of the purchase money is still due from Hale & Eaton, the notes for which are now in suit in the name of Cooper as assignee.

That on the 21st January, 1839, defendant Cummings by deed of that date, made a general assignment of all his real and personal estate, as well as his choses in action of every description, to Cooper, in trust, to take possession thereof and dispose of the same for the payment of the crditors of Cummings according to a classification described in the deed; that the deed was not filed for registration until the first April, 1839, in consequence of which, it is charged to be void as against the creditors of Cummings. That the deed was not made at the instance of, or consented to by any creditor of Cummings, nor is any one of them a party to the deed. That Cooper has not taken possession of the property, nor sold the same, nor has he paid the debts of Cummings; that the deed was made with the intent to delay, hinder and defraud the creditors of Cummings, and therefore void.

That on the 17th July, 1838, defendant Cummings, by deed of that date, conveyed to Cooper one half of lot 161, on which is a brick store house, for the consideration, as expressed in the deed, of twenty-nine hundred and twenty-five dollars; and afterwards, on the 19th January, 1839, conveyed to him the remaining half of the lot for the same pretended consideration. That on the 8th January 1839, Cummings & Cooper, by deed, conveyed to Hale & Eaton, a part of lot 161, for twenty-eight hundred dollars, payable in three instalments, on the 28th May, 1839, 1840, and 1841, who gave to said Cummings & Cooper a mortgage on the premises. That the first instalment has been paid, and the other two remain unpaid, suits having been brought thereon in the name of Cooper.

That at the date of the pretended deed of the 17th July 1838, Cooper was a young man apparently without means, having shortly before that time married the daughter of Cummings, and was, or pretended to be, his partner in the tailoring business. That neither the deed of the 17th July, 1838, or that of the 19th January, or either of them, were made upon the consideration express-

ed on their face, *bona fide* paid by Cooper to Cummings, or secured to be paid, but were voluntary or fraudulent.

That the conveyance to Clare, was either fraudulent, or that the purchase money is still due, and that the notes of Hale & Eaton were transferred to Cooper without consideration, and in fraud of creditors.

The prayer of the bill is, that the various deeds be declared fraudulent and void; that Cooper be compelled to account, &c.

Hale & Eaton failing to answer, the bill was, as to them, taken as confessed.

Clare states in his answer, that he purchased fairly from Cummings, and paid the purchase money in cash.

Cummings & Cooper answer jointly, and admit the purchase of the real and personal property of complainants intestate, judgments, return of executions, &c., as stated in the bill; admit the sale to Clare, but insist that it was fair, and that the purchase money has been paid: admit the sale of lot 161, at the times stated in the bill. They aver the fairness of the sales—that the consideration of the first sale was paid by Cooper in cash; that the consideration of the deed of 19th January, 1839, was the note of William A. Leland and John C. Cabaniss, for five thousand dollars, upon which is a credit of two thousand dollars, payable to Cooper, dated 15th June, 1838, and due one day after date, which they considered good, and which was transferred by delivery to Cummings. They admit the assignment of the notes of Hale & Eaton to Cooper, and that suits thereon are pending.

They admit the execution of the deed of assignment, and aver its fairness; that the object was not to defraud the creditors of Cummings, but to pay them. The deed is made an exhibit. They state that the personal property and assets conveyed by the assignment, have ever since the deed, been in the possession of Cooper; that the slaves were hired by Cooper to Cummings, who retained the same; they were not sold from a desire to obtain a good price for them—that from the date of the deed to the time of filing the bill, the slaves had appreciated in value. That there was no demand for the real property. That in March, 1842, a tornado passed over the dwelling house and destroyed it, and injured one of the slaves. The slaves were, one thirty-five, one forty or forty-five, and one sixty or seventy years of age. That

since then the real estate, furniture &c., and slaves have been sold.

Cooper states that he entered into partnership with Cummings on the 10th December, 1837, when he agreed with Cummings for the purchase of one half the lot on which the brick store house now stands, the cellar of which was only then dug, and that he paid out of his private funds, his portion of the expense of building the house; that he was then worth more than ten thousand dollars, and so reputed. Both defendants stated that the partnership continued until 21st January, 1839, at which time Cooper purchased the interest of Cummings, the stock amounting then to four thousand and sixteen dollars ninety eight cents. Cooper states that at the dissolution of the firm, he was in advance to the concern two thousand dollars, and that Cummings was indebted thirteen hundred dollars.

Cummings admits that he considered himself insolvent on the 19th January, 1839; but that he considered his property sufficient to pay his own debts. Both defendants deny that either of the deeds were voluntary or fraudulent, but insist that they were *bona fide*, &c.

Accompanying the answer are statements showing the property assigned by the deed—the amount of money collected since the 21st January, 1839, and payments made under the assignment. The bill is demurred to for multifariousness.

The cause coming on for trial on bill, answers and exhibits, the chancellor decreed that the deed of 19th January 1839, from Cummings to Cooper, and the deed of assignment, to be fraudulent and void, and directed a sale to be made of the interest of Cummings in lot 161, also of his equitable interest in lot No. 162: That Cooper be considered a trustee for the benefit of complainant, and that he accounts with complainant for all the moneis which have come to his hands by virtue of the assignment, and for one half the proceeds of the sale to Hale & Eaton, to be applied in discharge of complainants demand, &c. That the bill be dismissed as to Clare.

The assignments of error are,

1. Overruling the demurrer to the bill.
2. Declaring the assignment void, because not recorded within sixty days.
3. Declaring the assignment void in fact.

4. Declaring the deed of 19th January, 1839, void in fact.

5. Declaring the assignment of the notes of Hale & Eaton void.

6. Decreeing the sale of two parts of lot 162.

7. Requiring Cooper to account for the stock in trade.

8. In charging him with all moneys, which have come to his hands, and not allowing him credits for payments to creditors.

9. In not dismissing the bill.

W. Cochran, for plaintiff in error.

Peck & Clark, *contra.*

ORMOND, J.—The first question presented on the record, whether the act of 11th January, 1828, Aik. Di. 208, by which deeds and conveyances of real and personal property in trust, are declared void against creditors and subsequent purchasers without notice, unless recorded within the time prescribed by the act, has not been changed and in effect repealed by subsequent enactments on the same subject, is one of great interest and of some difficulty.

To a proper understanding of it, it is necessary to take a brief view of the entire legislation on this subject.

In 1803 the statute of frauds was passed, by which certain deeds were declared void, unless proved and recorded within twelve months, in the superior or county court where one of the parties lived. At the same session, and frequently since that time, acts were passed for the registration of absolute deeds of real estate. [Aik. Dig. 88.]

On the 11th January, 1828, an act was passed to prevent fraudulent conveyances, which required all deeds made in trust for the payment of debts, if of personal property, to be recorded within thirty days, or if of real property within sixty days from the execution thereof, or else to be void against creditors, and subsequent purchasers without notice.

At the same session, on the 15th January, 1828, an act was passed declaring all deeds valid if recorded within six months after their execution, and all deeds recorded after that period to be operative from the date of their registration.

This act being supposed to conflict with and repeal the former, at the succeeding session an act was passed declaring that the act of 11th January, 1828, should stand in full force, and that the

act of 15th January should apply only where property was conveyed absolutely, and not upon any trust or condition.

On the 24th January, 1829, an act was passed extending the time of registering deeds, to twelve months after its passage. On the 10th January 1831, the time of registering deeds was extended to eighteen months after its passage; and on the 18th January 1832, the time for registerting deeds of "real and *personal* estate" was extended to one year from the passage of the act. On the 10th January, 1835, it was enacted, that hereafter it shall at all times be lawful for any person or persons who have failed to have deeds and conveyances of real or personal estate recorded within the time prescribed by law, to have them recorded: *Provided*, that such registration shall not affect the rights of subsequent purchasers, or creditors, which may have vested previous to such registration, any law to the contrary notwithstanding.

And finally on the 25th December, 1836, an act was passed extending the time of registering deeds of real and personal estate, to six months from the passage of the act. All these acts last enumerated, passed since 1828, were evidently merely intended to extend the time for the registration of absolute deeds, and even for that purpose were wholly unnecessary, as the act of 15th January 1828, declared, that all absolute deeds should be valid and operative from the date of their registration, if not recorded within six months after their execution. These acts were therefore, evidently passed without any distinct conception of the existing law.

The only difficulty which arises from this unnecessary legislation, proceeds from the terms, "deeds of personal property" found in the acts of 1832, 1835 and 1836, which it is insisted must have been intended to operate on the act of 11th January, 1828, as that is the only statute which requires such deeds to be recorded.

The difference between the registration acts, properly so called, and the act of the 11th January, 1828, for the prevention of fraudulent conveyances, is quite obvious. By the latter, the deed is declared *void* as to creditors and subsequent purchasers, if not recorded within the time required by law; by the former acts, if the deed be recorded within six months, it is operative against all persons from the date of its execution, and if recorded after that time, is operative in like manner from the date of its registra-

tion. The object of the latter is notice merely, whilst the design of the former is the prevention of fraud. To accomplish which it requires prompt notice to be given of the execution of the deed, not only to prevent a delusive credit from being obtained by the apparent ownership of property, but also to prevent such deeds from being *ante dated*, which can only be effectually prevented by requiring them to be published soon after they are made.

If these enumerated acts, passed since 1828, are held to apply to the act for the prevention of fraudulent conveyances, they effectually destroy its vital principle, by permitting the deed to be kept *secret* for a great length of time, and, indeed, by the act passed in 1835, which permits the registration to be made at any after period, virtually repeal it. It is incredible that the Legislature should have intended thus to repeal, by indirection, one of the most important acts on the statute book. It is much more respectful to that body to suppose that in the hurry of business, the *terms* of these acts, which, as they were ostensibly mere registry acts, and the rights of creditors and subsequent purchasers were guarded, were not properly scanned, than to hold that they deliberately left the community to grope in the dark, uncertain whether or not, it was its intention virtually to repeal so important an act.

If, however, the act of 1835 could apply to *deeds of personal* property required to be recorded by the act of 11th Jan. 1828, that act was itself repealed by the act passed at the succeeding session, on 23d December, 1836, which requires all persons who have failed to have such deeds recorded within the time required by law, to record them within *six months* from the passage of that act. [Meek's Sup. 85.] This time had expired befor this deed was made, and it must therefore be governed by the act of 11th Jan. 1828. This settles the question as to this deed; but we are entirely satisfied that it was not the intention of the legislature to repeal, modify or change the act of 11th January 1828 by any of the subsequent acts which have been enumerated. That these last mentioned acts are registry acts merely, and were designed to apply to absolute deeds only.

It was also argued that this deed was not embraced by the act of 11th January, 1828, which, it was contended, was only intended to operate on deeds conveying property in trust to secure the payment of debts between the parties to the deed, and did not reach assignments of property in trust to pay creditors.

Deeds of this description are not only within the mischief, but are within the letter of the law; they are literally "conveyances to secure debts," and no reason has presented itself to our minds authorising such a departure not only from the intent, but from the very words of the statute.

What is meant by the term "creditor" in the act of 11th January, 1828, it is not necessary now to consider, as we think the entire transaction fraudulent and void.

The facts are, that the defendants Cummings and Cooper stand to each other in the relation of father-in-law and son-in-law, and were partners in trade; that on the 19th of January, 1839, Cummings conveyed to Cooper, one half of a lot of ground in Tuskaloosa, on which was a brick store house, for the consideration, as stated in the deed, of twenty-nine hundred and twenty-five dollars, having a year or two previously sold him the other half at the same price. On the 21st of the same month, Cummings made a deed of assignment to Cooper, of all his effects, real and personal, and all his title thereto, whether legal or equitable, including three slaves, house-hold and kitchen furniture, choses in action, &c., upon trust, that Cooper should take possession thereof, and manage, sell and dispose of it, collect debts, &c. as he should deem most for the interest of the creditors; and from the proceeds first to pay a debt due the State Bank; second, to pay all the individual debts of Cummings; the debts of Cummings & Cooper, and of Cummings & Mason; and lastly all other creditors in equal proportion. The deed is executed by Cummings & Cooper alone, and it does not appear that any of the creditors were privy to, or assenting to it.

These deeds the bill charges to have been made with the intent to delay, hinder and defraud creditors. The answer of both Cummings & Cooper, insist that they were both fair and *bona fide*. That the consideration of the deed for one half the lot to Cooper, was a note made by W. A. Leland and J. C. Cabaniss to Cooper, on the 13th June, 1838, for five thousand dollars, due one day after date, on which was a credit of two thousand dollars, which was transferred to Cummings by delivery, and was then considered good, and is now part of the assets of Cummings. That the design of the deed of assignment was to secure to the creditors of Cummings, a just distribution of his property, and was made *bona fide*.

The chancellor considered the conveyance to Cooper, and the deed of assignment, as parts of the same transaction; we have attained the same conclusion. The insolvent condition of Cummings was known when the pretended sale was made to Cooper, and two days afterwards the product of the sale passes into the hands of Cooper, as part of the effects of Cummings, conveyed by the trust deed. The sale by Cummings of such a valuable portion of his property, immediately preceding the making of the assignment, is of itself a suspicious circumstance; but in addition, it is sold to a near relation, not for money or any thing of real value, but for dishonored paper, and not even the precaution taken of an assignment from Cooper, but a mere transfer by delivery, which in two days passes back to Cooper, in his capacity of trustee, who, it does not appear, has ever made an effort to recover the money. The whole transaction wears the aspect of unfairness, and has not one of the features of a real *bona fide* sale. It is possible that these suspicious circumstances, which are so many badges of fraud, might admit of explanation; but they are not attempted to be explained further than by the repeated asseveration, that all was fair and *bona fide;* and unexplained, they irresistibly lead the mind to the conclusion, that this pretended sale, was a scheme to transfer this valuable property to a relation, without any real consideration, and thus place it beyond the reach of creditors.

It is, however, insisted that the answer of Cooper is evidence for him, and by that it appears that the note of Leland and Cabaniss, was *considered good* at the time it was received by Cummings. It is certainly the well establish rule in chancery that when an answer is directly responsive to an allegation of the bill, it is evidence for the defendant; but when the defendant in his answer, sets up new matter in avoidance of an allegation of the bill, as he puts such fact in issue, he assumes the burden of proving it, unless under the rule adopted by this court, the complainant waives the necessity of such proof by going to trial by *consent*, on bill and answer, which was not done in this case.

The allegation of the bill is, that the deed of the 19th January, was not made upon the considertion expressed in it, or *bona fide* paid to the said Cummings by the said Cooper, or in good faith secured to be paid, but was a voluntary conveyance, or made to the intent to delay, hinder and defraud creditors. The interroga-

tory framed upon this allegation is, "that he state whether the same was paid in money at the time specified in the deed; if not, did he secure the same to be paid, and how and when to be paid, and has the same in fact been paid? If so, when was the payment made, and in what?"

The answer to this interrogatory is, that the consideration of the deed was the note of Leland & Cabaniss, six months past due, which was transferred to Cummings by delivery, and which "respondents considered good."

It is no where alleged in the bill that Cummings received from Cooper, as the consideration of the deed, paper which he knew to be of no value; but the allegation is, that the consideration as expressed in the deed, was neither paid by Cooper or secured to be paid. The answer in effect admits this, by showing that Cooper did not pay the consideration in money, or become bound to pay it; to avoid the effect of this admission, it is further stated that the real consideration was the note of third persons, which at the time *respondents considered good.* The *estimation* in which the defendants held this paper, at the time of this transaction, is clearly matter set up in avoidance. It is true, that the interrogatory requires the defendants to state "when the payment was made, *and in what;*" and so far as the answer shows that the payment was made in the note of a third person, it may be considered responsive to the interrogatory. But when, in addition, it is added *that at the time they considered the note good,* a new fact is introduced into the case, which is not so much as hinted at in the bill. The complainant did not profess to have any knowledge of the consideration beyond what was disclosed by the deed. From that it appeared that the consideration was paid by Cooper in money, or at least no intimation to the contrary was given, and such was the natural as well as legal inference. This, the complainant asserts to be untrue, and denies that money or its equivalent in value was paid.

It would be extremely hazardous to seek the aid of a court of chancery, if such a response to such an allegation, was evidence for the defendant, only to be countervailed by the testimony of two witnesses, or of one, with strong corroborating circumstances. Not being proved, it can avail nothing in this case. [Huntsville Branch Bank v. Marshall, *et al,* 4 Ala. 60.]

We proceed to the consideration of the deed of assignment,

made two days after the transaction just commented on. The proximity in point of time between the conveyance to Cooper, and the deed of assignment; the knowledge of Cooper and Cummings that the latter was insolvent when the deed of the 19th January was made, and the fact that the note received as the consideration of the deed of the 19th January, passed almost immediately back to Cooper, by the assignment, as part of the effects of Cummings—are sufficient to show that the assignment and the previous deed to Cooper, are parts of one entire transaction, having the same object in view—to delay, hinder or defraud the creditors of Cummings. There are, however, other circumstances attending the assignment, which, independent of the previous deed, establish its true character, of which a brief view will be taken. It does not appear that any creditor has assented to the deed, and this is, in truth, a controversy between a creditor and the grantor.

The deed of assignment conveys to the trustee all the real and personal property, and choses in action, of Cummings, in general terms, and without any description whatever, either in the body of the deed, or in any schedule annexed to it, except three slaves, who are described by their names, and confers on him authority to manage, sell, and dispose of it, collect debts, &c. as he shall deem most for the interest of the creditors. No creditor is specified by name, except the State Bank; nor is there in the body of the deed, or in a schedule attached to it, any list of the names of the creditors, or of the sums due them. There is no provision in the deed for the creditors to become parties to it, or for notice to be given them; nor does it appear that any notice in fact was given.

In the case of Robinson v. Rapelye and Smith, [2 Stewart 86,] this court held that the conveyance, by the assignor, of all his property in general terms, did not invalidate the deed; and it may be conceded that neither of the facts above enumerated, or all taken together, would be conclusive evidence of fraud; yet certainly, considered altogether, they raise the presumption of fraud, which, it is true, might be removed by other facts attending the transaction, but which, unexplained, stamp it as fraudulent. [Halcey v. Whitney, 4 Mason, 206; Wilt v. Franklin, 1 Binney 516; Hower v. Gessamine, 17 S. & R.; Hatch v. Smith, 5 Mass. 42; Keyes v. Brush, 2 Paige, 311.] It is indeed, difficult to conceive

of any thing better calculated to delay creditors, than a deed of assignment conveying all the property, real and personal, of the grantor, without any description or estimate of value, for the benefit of creditors who are not consulted, named in the deed, or the amounts due them set forth, or in any way made known.

These suspicious circumstances derive additional force from the manner in which the trust has been executed. The principal part of the debt of complainant was the individual debt of Cummings, which, by the deed, is placed in the list of preferred debts, after the payment of the debt to the Bank. Yet, although the trustee professes to have paid a large amount of debts, in addition to the debt due the Bank, no part of this debt has been paid, although he insists that the assets are nearly or quite exhausted. It was his duty, as trustee, to have paid all debts of the same degree, *pro rata*, if there was not sufficient to pay all.

No portion of the trust estate, except the choses in action, appear ever to have been in the possession of the trustee, but were left in the possession of Cummings, upon an alleged contract of hiring, the terms or conditions of which are not given, nor does any thing appear to have been received from that source. The possession remaining with the grantor, is a badge of fraud—admitting, it is true, of explanation; but the attempt to reconcile this apparent inconsistency, by the trustee, is most extraordinary. The slaves were from near forty to seventy years old, and were reserved from sale that they might appreciate in value. The same reason, in effect, is assigned for not selling the dwelling-house and other personal property; yet, we know, that from the operation of well known causes, which we take judicial notice of, all property has been depreciating in price since the date of the deed. Nor was any sale made until the dwelling-house was nearly destroyed, and the slaves injured by a tornado, in March, 1842; and when sold, it appears that all the property, except a few inconsiderable articles, was purchased at a low rate, by a son of Cummings.

We have not considered it necessary to narrate the glaring inconsistencies of the answer, and of the schedules annexed to it, because the unquestioned facts admitted by the answer, and the entire omission on the part of the defendants to explain or account for the various suspicious circumstances above described, irresistibly impel our minds to the conclusion, that the object of the

parties was, through the medium of this assignment, to delay, hinder and defraud the creditors of Cummings, and that it is therefore void.

It is also objected to the decree, that the court erred in directing a sale of the land, in which Cummings had only an equitable interest. These lands were purchased by Cummings at a sale, directed by the county court, of the real estate of the intestate of complainant, who gave bond with surety for the purchase money, but no title was ordered to be made to him by the court, for some reason, which does not appear. The objection supposes, either that the legal title vested in Cummings, on the approval, by the Orphans' court, of the bond executed by him for the purchase money, or that the equitable lien on the land was discharged by the execution of the bond with surety. As to the first supposition, it is very clear, that the approval by the court of the bond for the purchase money, does not vest the legal title in the purchaser, as the statute expressly requires the court to *decree* that a title be made, and until the conveyance is in fact made, the legal title remains in the heirs at law. [Lightfoot v. Lewis's heirs, 1 Ala. R. 475.] And as to the second, the doctrine has no application to a case where the title is not in fact made. The reservation of the *title* is a plain and palpable assertion of a *lien* for the purchase money. [Foster v. The Athenæum, 3 Ala. 302.] But whether the title of Cummings was legal or equitable, it passed by the conveyance to the trustee, and was therefore properly included in this bill, and could only be sold by the decree of a court of chancery.

The propriety of the decree of the chancellor, requiring the trustee to account, and making all the monies received by him under the trust, liable to the payment of the complainant's debt, without allowing him credit for debts paid by him, is also questioned. The correctness of the decree, supposing this to be its meaning, must depend on the right the complainant acquired under her judgments, and by the exhibition of her bill, as she had no specific *lien* on the property of Cummings. By the judgments and execution, a *lien* was obtained on the real estate, from the date of the judgments, and on the personalty, except *choses in action*, from the time the executions came to the sheriff's hands. These *liens* are rendered effectual by the decree, declaring the deed to Cooper, and the deed of assignment, void against all per-

sons acquiring title either through Cummings or the trustee, subsequent to the *filing* of the bill. All purchasers from the trustee, previous to that time, who bought *bona fide*, and without notice of the fraud, are not affected by the decree avoiding the conveyance to the trustee for fraud.

The exhibition of the bill is in effect an appropriation, from that time, of the equitable assets of Cummings, upon which the complainant acquired no *lien* by his executions; but all payments made to the creditors of Cummings, by the trustee, before that time, are in effect, payments made by Cummings himself. The deed of assignment, though fraudulent and void as to creditors, is at least a power of attorney from Cummings to the trustee, to pay and discharge his debts, out of the effects placed in his hands for that purpose. Of these payments by the trustee, before the exhibition of the bill, the defendant in error cannot complain, as they were made from funds upon which she had no *lien*, legal or equitable. She is not therefore, prejudiced by the action of the trustee; the effect is the same to her as if the deed of assignment had never been made, or the payment had been made by Cummings himself. The trustee must, therefore, in the account, be allowed credit for all payments made to the creditors of Cummings previous to the filing of the bill.

As the claim of the defendant in error is against Cummings individually, and as the assets in the hands of the trustee are composed of the interest of Cummings, in the firm of Cummings & Cooper, as well as those belonging to Cummings individually, it may become necessary to marshal the assets in the hands of the trustee, as the creditors of the partnership are entitled to be paid before an individual creditor of Cummings out of the partnership effects. In this connexion, it may be proper to observe, that in stating the account, Cooper must be charged with one-half the value of the stock in trade at the time of the dissolution, which in his answer he states that he purchased from Cummings, and that his answer, which impliedly sets up a payment by debts due from Cnmmings, is not evidence of that fact, as it is not responsive to any allegation of the bill.

The objection that the bill is multifarious, cannot prevail. The objection is founded on the attempt made in the bill to subject the property sold to Clare, by Cummings, to the payment of complainant's debt, with which it is alledged Cooper had no connec-

tion. The transactions of Cooper and Cummings were so intimately blended, and the deed of assignment was so general, that it was impossible for the complainant, in advance, to know to what extent Cooper was interested or connected with the transactions of Cummings, or what he claimed an interest in; and especially, the complainant had a right to know whether the purchase money had ever been paid by Clare; if not, it was conveyed by the deed of assignment to Cooper.

This question was examined by this court in the case of Lewin v. Stone, [3 Ala. 491,] where it is held that this objection is not favored at this day, when the ends of justice are not promoted by it. Such is obviously not the fact here; nor has the defendant Cooper been in the slightest degree prejudiced by it.

The result of this protracted examination, is, that the decree of the chancellor, in the particulars herein stated, in regard to the manner of taking the account, must be modified. In all other respects it is affirmed, and the cause remanded for further proceedings.

Let each party pay his own costs in this court.

COLLIER, C. J.—My first impression was that the bill in this case is *multifarious;* but an examination of its frame and object, have convinced me that it is not obnoxious to that objection. It assumes that all the property it describes, or money due for such as may have been *bona fide* sold to third persons, constitute effects and credits of Cummings, in favor of judgment creditors, although it may be claimed by others, under pretended purchases. Cummings, as between himself and the complainant, is treated as the real owner of the property and credits, and those persons who claim to be adversely interested therein, are made parties, that they may defend against their appropriation to the satisfaction of the complainant's judgment. The object of the bill is clearly single; and although all the defendants are not jointly interested in the matters which may be litigated, yet if the allegations of the bill are true, each one of them, unless it be Cummings, is interested to gainsay such a decree as the complainant seeks. While then, the matter of the bill is such as might properly be the subject of one suit, each defendant is concerned in some part of the litigation, and according to the rule which re-

quires all parties in interest to be brought before the court, they were properly joined.

In respect to the question, how far the validity of the deed of assignment was affected by the neglect to register it within sixty days from the date of its execution, my opinion is different from that of my brother's. If it were necessary, I would say, that the inclination of my mind was opposed to the construction which they have given to the statutes upon the subject. But I will place my conclusion on the point upon grounds less disputable. It may be laid down generally, that the date of a deed is not an essential part of it. [Com. Dig. Fait B. 3.] Hence it has been said, that a deed is good, although it mention no date; or hath a false, or impossible date; provided the real day of its being dated or given, that is, delivered, can be proved. [2 Bla. Com. 304; Co. Litt. 46.] And it has consequently been held, that a person may declare in covenant that the deed was indented, made and concluded, on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made and concluded. [4 East's Rep. 477. See also, 2 Ld. Raym. Rep. 1076.] Conceding then, that the assignment from Cummings to Cooper had become inoperative, or void, yet the acknowledgment made by the former that he had signed, sealed and delivered it to the latter, on the first day of April, under the act of 1828, unaided by subsequent legislation, imparted renewed vitality to the deed, and made it effectual from the acknowledgment of delivery. This would seem to be a direct sequence from the common law rule which affirms that a date is unessential to a deed. Whether the law would be the same where the acknowledgment was made before the expiration of the sixty days, I will not, as it is unnecessary, undertake to consider.

If the date of the deed had been stricken out, and another inserted, or a blank left, it cannot be doubted that the deed would have taken effect from its delivery and subsequent acknowledgment; and why the permitting the date to remain unchanged, can have any prejudicial effect, is what I cannot comprehend, if a date is unimportant and superseded by delivery. Upon the other points of the case, I concur in the conclusions of my brother ORMOND.

McADEN v. GIBSON.

1. A plea by a sheriff justifying the seizure of property under process of attachment must allege that the writ was returnable, to what court, and that it was in fact returned. But it may, perhaps, be permissible to excuse a return by proper averments.
2. Where the replication or rejoinder, &c., contains matter which does not support and fortify it, and which is consequently not pursuant to it, there is a departure in pleading, of which the opposite party may avail himself on demurrer.
3. The defendant in an action of detinue pleaded the general issue, and several special pleas; to the latter pleas there were replications, rejoinders and sur-rejoinders; the defendant demurred to the sur-rejoinders and his demurrers were sustained; and the plaintiff declining to plead further, the court ordered a non-suit; *Held*, that the non-suit was irregular, and the plaintiff should have been allowed to submit his case to the jury on the general issue.

WRIT of Error to the Circuit Court of St. Clair.

This was an action of detinue, brought in the county court of St. Clair, by the plaintiff in error, against the defendant, for the recovery of several slaves, to wit: Dick, a man, Sophia and Jude, women, Bill, Lewis and Doctor, boys, and Liza, a girl. The defendant pleaded; first, *non detinet;* second, that he was sheriff of St. Clair county, and that in that character he levied on the slaves in question, under an attachment at the suit of Thomas Alford, against the estate of the Mississippi and Alabama Rail Road Company, issued on the 19th October, 1840, by Shadrack Morris, a justice of the peace of that county, for the recovery of a debt, amounting to five hundred dollars, besides costs. It is averred that the slaves were the property of the Mississippi and Alabama Rail Road Company; and therefore the defendant justifies the levy on, and detention of them. *Third*, the defendant justifies the levy on, and detention of the slaves under an attachment issued by the same justice, on the 12th November, 1840, at the suit of Thomas Alford against the estate of the Mississippi and Alabama Rail Road Company, for the sum of three thousand two hundred and forty dollars, and avers that they were the property of that Company.

Issue was taken upon the first plea, and the plaintiff replied to the second and third, that he ought not to be precluded from recovering the property in his declaration mentioned, because it was not the property of the Mississippi and Alabama Rail Road Company, and that a demand had been made before a levy of the attachments specified in the defendant's pleas, to wit: on the twelfth of October, A. D. 1840. The defendant by way of rejoinder to these replications insisted that he should not be precluded, &c.; because on the 21st of September, 1840, two several attachments were issued by Shadrack Morris, a justice of the peace, &c., at the suit of Thomas Alford against the Mississippi and Alabama Rail Road Company, one for one thousand six hundred and forty dollars, the other for two thousand two hundred dollars, both of which were received by the defendant as sheriff, &c., on the 22d September, 1840, and levied on the slaves in question. And so he avers that he held them under these attachments, as he lawfully might, on the twelfth of October, 1840. The plaintiff moved the court to strike out this rejoinder, but his motion was overruled; thereupon he demurred, and his demurrer being overruled, he filed a sur-rejoinder, setting forth that the attachments mentioned in the rejoinder of the defendant, were pending and undetermined simultaneously with the attachments under which defendant justified in his second and third pleas. To this the defendant demurred, and the demurrer being sustained, the plaintiff refused to plead further. The court thereupon ordered that the plaintiff be non-suited, and a judgment was entered accordingly, that the defendant recover his costs, &c.

To revise this judgment a writ of error was prosecuted to the circuit court, where it was affirmed.

Rice, for the plaintiff in error argued—1. That the pleas of justification were had, because they do not show, that the attachments were returned or returnable. [Com. Dig. Plead. E. 17.]

2. The rejoinder is a departure from the pleas, and of course demurrable. [3 Chitty's Plead. 577, '8, Com. Dig. F. 7, H. 3.]

3. The non-suit was irregular and unauthorised. [Minor's Rep. 75; 3 Stew'ts Rep. 38; 1 Cow. Rep. 601.]

Moody, for the defendant.

COLLIER, C. J.—1. It is insisted that the second and third pleas are bad, because they do not allege that the attachments under which the defendant justifies the detention of the slaves in question, were returnable, or in fact returned to any court. It has been held in many English cases, that an officer cannot justify under *mesne* process after the day appointed for the return, without showing that it was returned, although with respect to writs of execution the law is otherwise. [Hoe's case, 5 Co. Rep. 90; Freeman v. Blewitt, 1 Salk. Rep. 409; Rowland v. Veale, 1 Cowp. Rep. 18; Cheaseley v. Barnes, 10 East's Rep. 73, 82; Middleton v. Price, 1 Wilson's Rep. 17; Britton v. Cole, 1 Salk. Rep. 408; Girling's case, Cro. Car. 446. See also 2 Rolle's Ab. 562; pl. 14, 16; 1 Lord Raym's Rep. 632; 12 Mod. Rep. 394; Holt's Rep. 408.]

In Barnett v. White, et al. [3 N. Hamp. Rep. 229,] it is said, in some cases a public officer may forfeit the protection of the authority under which he acts, by an abuse, which consists in a mere non-feasance, as is the case when a sheriff who has made an arrest, or a seizure of goods by virtue of *mesne* process, neglects to return the process. And the same rule is recognized in Parker v. Pattee, [4 N. Hamp. Rep. 530,] but the court say that it can rarely have any practical application in the system of jurisprudence prevailing in that State; and, if the question whether such rule should be adopted, were for the first time presented, it is not unlikely that it might be answered in the negative. So in Oystead v. Shed, et al, [12 Mass. Rep. 511,] one of the questions was, whether a person who had acted as the servant of the sheriff under *mesne* process, could justify when the writ was not returned. The court said, "if a stranger comes in aid of an officer executing legal process, and the officer afterwards omits to return the writ, or by any other subsequent abuse of his authority, becomes a trespasser *ab initio*, this shall not prejudice the stranger, nor make him a trespasser. The same principal applies to bailiffs, who serve a writ by virtue of a precept from the sheriff. If such writ be not duly returned by the sheriff, he is a trespasser, but the bailiff is not punishable." See also Purrington v. Loring, [7 Mass. Rep. 388.] Although these cases do not expressly declare the existence of the rule in Massachusetts, yet they impliedly recognize it, and in Plummer v. Dennett, [6 Greenl. Rep. 425,] the Supreme court of Maine lay down the law in

equivalent terms. See also Coburn v. Hopkins, 4 Wend. Rep. 577 ,9; Beals v. Guernsey, 8 Johns. Rep. 52; Hopkins v. Hopkins, 10 Id. 372; Gardner v. Campbell, 15 Id. 400.]

The cases cited shew the rule as stated, to be too firmly settled to authorise us to refuse its recognition. When restricted in its application to the officer charged with the return of the process, it can be productive of no injury or inconvenince. But even in such cases we will not say, that it would not be allowable for the officer to excuse the return of a writ by alleging its loss, or something, the effect of which would be to prevent its return, without the fault of the party charged with that duty. [See Coburn v. Hopkins, 4 Wend. Rep. 577 9; Parker v. Pattee, 4 N. Hamp. Rep. 530.] But in the present case, the pleas neither allege the return of the attachments, or attempt to excuse the neglect.

Taking the pleas we are considering without the implication of something not alleged, and they do not show that the attachments were valid as legal process. It is not averred that they were made returnable to the county or circuit court, to which alone they could be. If they were not returnable to either of these courts, they must have been irregular, could not have been proceeded on to judgment, and consequently did not warrant the action of the sheriff. A plea professing to justify under the authority of process should set forth matter, which if true, would bar the action. To conform to this rule, it should, in addition to other material averments, substantially describe the writ. In this view, both the objections of the plaintiff to the pleas are well taken.

2. A *departure* in pleading is said to be, when a party quits or departs from the case or defence which he has first made, and has recourse to another; it occurs when the replication or rejoinder, &c., contains matter not pursuant to the declaration or plea, &c., and which does not support or fortify it. One reason why a departure in pleading is never allowed, is, because the record would by such means be spun out into endless prolixity; for he who has departed from, or relinquished his first case or plea, might resort to a second, third, and so on *ad infinitum;* he who had a bad cause would never be brought to issue, and he who has a good one, would never obtain the end of his suit. [1 Chitty's Plead. 7th Am. ed. 681; Co. Lit. 304, a; 2 Saund. Rep. 84, n. 1; 6 Com. Dig. tit. Pleader, F. 7, 8, 9, 10, 11, and the cases cited by these authors.]

It is needless to extend this opinion by the citation of cases to show, that the rejoinder does not pursue and fortify the defence set up by the pleas. This is sufficiontly shown by the definition of a *departure*. The pleas are an attempt to justify under attachments issued, it is true, at the suit of the plaintiff, but on a different day and for a different amount. In fact it is conceded, that the rejoinders do not rely on the same process to defeat a recovery, as that which is insisted on by the pleas.

The defendant's demurrer to the plaintiff's sur-rejoinder, according to the settled practice, should have been visited upon the first defect in the pleadings. The replications answer the pleas, by denying that the slaves in controversy were the property of the defendant in the attachments, and that a demand had been made of the defendant in this action, before he levied the same. This latter allegation was, perhaps, unnecessary, but not fatal; we are, however, by no means sure, that the plantiff should not have reaffirmed his right of property; the mere denial that the slaves did not belong to the *Rail Road Company*, not being equivalent to an allegation that he is their owner. But be this as it may, the rejoinder is for the reasons already stated, bad on *general demurrer*. [See 6 Com. Dig. tit. Pleader, F. 10; 2 Saund. Rep. 84, n. 1, and cases there cited; 1 Chitty's Plead. 7 Am. ed. 686, and cases there cited.]

3. The circuit court also erred in ordering the plaintiff to be non-suited. Whether such a disposition of a cause is not allowable where the plaintiff refuses or neglects to proceed with the pleadings so as to put the case in a condition for trial, it is unnecessary to determine. It appears from the record in this case, that the general issue had been pleaded, and it was competent for the plaintiff to have submitted his case to the jury on that plea, without even adding a formal *similiter*. The plaintiff then, should have been permitted to go to trial had he so elected, and should not have been non-suited, unless he declined proceeding to try his case on the general issue.

Whether the defendant can justify the detention of the slaves under process levied after the commencement of the plaintiff's action, or whether, without reference to such process, he may show that the plaintiff has no title unconnected with the Rail Road Company, are questions not directly presented by the record, and will not now be considered.

The consequence of what we have said, is, that the judgment must be reversed, and the cause remanded.

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PARKMAN & STRINGFELLOW v. ELY.

1. Upon an issue to a plea that a note was given without any consideration, the note is *prima facie* evidence of a consideration.

ERROR to the Tallapoosa Circuit Court.

Assumpsit by the defendants in error, againt the plaintiffs in error, on a promissory note. The defendants pleaded *non assumpsit*, and a special plea, that the note was given without any consideration. The plaintiff took issue on the first plea and replied to the second "that the note declared on was not given without any consideration." To this replication the defendant demurred, and the court overruled the demurrer.

On the trial of the issue, the plaintiff offered in evidence the note sued on, and rested his case, and this being all the evidence the defendant demurred to it, and the court rendered judgment on the demurrer for the plaintiff.

These matters are assigned for error.

HEYDENFELDT, for the plaintiff in error—cited, Gould on Plead. 344; 3 Ala. Rep. 316.

PECK, *contra*, was stopped by the court.

ORMOND, J.—No doubt whatever can be entertained that the demurrer to the evidence was properly sustained. The statute, [Aik. Dig. 283,] makes the instrument sued on evidence of the debt or duty, for which it was given, unless its execution is denied by a sworn plea.

It results necessarily from the statute above cited, that the replication to the plea of want of consideration, that there was a consideration, was sufficient. The effect of this plea was to put the consideration of the note in issue, but by no form of pleading can the burden of proof be cast on the plaintiff, unless the execution of the note is denied by a sworn plea. To hold otherwise, would be to permit the defendant, by a slight alteration in the form of a plea, to defeat the purpose of the statute. The case cited from 3 Ala. Rep. 316, merely shows that a plea averring a want of consideration, is a good plea. The question of the *onus probandi* did not arise in that case.

This construction of the statute has been considered correct from the decision of the case of McMahon v. Crockett, [Minor's Rep. 362,] to the present time. To the same effect, is Boone v. Shackelford, [4 Bibb 67,] upon a statute analogous to ours.

Let the judgment be affirmed.

MARSTON v. FORWARD.

1. When depositions of witnesses are taken as residing more than one hundred miles from the place of trial, the distance is to be computed by the usual and customary land route, although there is a more convenient, and therefore a more usual route of greater distance by the river.
2. When the want or failure of consideration of a note, as shewn by the defendant in an action, by the endorsee of a note negotiable and payable in Bank, it rests with the plaintiff to show that he gave value for it before its maturity, in order to obviate the defence.

WRIT of Error to the County Court of Clarke county.

Assumpsit on a promissory note, dated 15th April, 1836, payable twelve months after date, to the order of Darwin Gibson, negotiable and payable at the Bank of Mobile. The note is signed by Forward, and endorsed in blank by Gibson. The suit is by Marston as indorsee.

At the trial, under the pleas of the general issue, and failure of consideration, the defendant offered to read the depositions of certain witnesses, taken under the act authorizing depositions to be taken when the witnesses reside more than one hundred miles from the place of trial. The plaintiff objected, on the ground that the witnesses did not reside so far from the place of trial; and the proof was, that from Macon, where the trial was had, to Mobile, where the witnesses resided, was less than one hundred miles; that there was a road sometimes used, by which the distance was not more than ninety-five miles, but the usual and common route was by the river, by which the distance was more than one hundred miles. The court overruled the objection, and held that the distance was to be computed by the usual travelling route. The defendant offered to impeach the consideration of the note, by showing that it was executed to Gibson, to be used only for the building of a boat intended to navigate the Alabama river. The plaintiff objected to this evidence unless the defendant proved that the plaintiff had notice of the failure of the consideration before he became the holder of the note. The objection was overruled and the evidence admitted.

The plaintiff then asked the court to charge the jury, that unless he had had notice of the failure of consideration of the note, before he became its holder, he was not affected by it. This was refused, and the plaintiff excepted to the several rulings against him.

It is now assigned that the court erred in these several matters.

Blount, for the plaintiff in error.
Pearson, *contra.*

GOLDTHWAITE, J.—1. The act of 1837, [Meek's Sup. 365, § 4,] which authorises the depositions of witnesses to be taken when they reside more than one hundred miles distant from the place where the court is held in which the cause is pending, must be considered as computing the distance by the usual and ordinary land route. We understand the contest in the court below was, whether the distance was to be computed by the river, that being the most usual, or by the land route, sometimes, but not usually travelled. The object of the statute was to relieve witnesses from the inconvenience of travelling more than one hun-

dred miles, but it does not follow that because there is a longer route, which is the most convenient, and therefore the most usually pursued, that the latter is to be selected to relieve the witness from travelling less than the distance indicated by statute. We think the court on this point erred.

2. As to the other question, the rule was correctly held by the court. It is obvious that it would always be difficult to trace direct notice to a holder of a note, of the fact of the want of consideration, or its failure. When therefore, a state of facts is proved, from which a failure of consideration is to be inferred, it rests with the holder to avoid the consequences of such proof, by showing that the note came to his hands for value paid for it before it was due. [Chitty on Bills, 8 ed. 79.] The rule formerly prevailed in England, in one of its courts, to require that the defendant should give notice of this defence in order to put the plaintiff on his guard, and such seems now to be the rule in New York. [Valett v. Parker, 6 Wend. 615.] We do not consider notice as necessary to let in such a defence; but if it was, the plea in this case was sufficient to put the party on his guard.

Judgment reversed and remanded.

HENDERSON v. RICHARDSON.

1. A plaintiff in execution stated to the court in writing, that the sheriff had collected of a defendant a large sum of money on executions in his hands, (some of which were in favor of the plaintiff,) and concluded with an affirmation that the money should be applied to the satisfaction of his judgments and executions:—*Held*, that although the plaintiff might have moved against the sheriff, for the failure to pay over the money upon his executions, yet upon the suggestion made, no judgment could be rendered against the sheriff, on which a writ of error could be sued out.

The defendant in error stated in writing to the Circuit Court of Conecuh, that the plaintiff as the sheriff of that county, had, by the sale of lands, collected a large sum of money on executions

placed in his hands against William A. Bell. The judgments, executions, time of the issuance, &c., are particularly described. Two of these executions are in favor of the defendant. The statement concludes as follows: "And so the said Stephen C. Richardson affirms that it should be applied to the payment and satisfaction of his said judgment and executions."

The plaintiff in the other executions interposed and stated reasons why the judgments in favor of Richardson, though of an older date than theirs, had lost their lien, and insisted upon the right to be first satisfied.

The order made by the court treats the matter as raising a question between Richardson and Henderson, declares that as the judgments were older than those in favor of the other creditors whose executions the sheriff also held, they were intitled to be first paid, and concludes as follows: "It is therefore ordered, that the said David F. Henderson, sheriff as aforesaid, do apply the said monies arising from the sale of said real estate of said William A. Bell, to the payment and satisfaction of of said judgments of said Stephen C. Richardson, against the said William A. Bell."

No where is the proceeding noticed as a motion against the sheriff to compel him to pay over money which he improperly withholds; but it is characterized as a motion for the application of monies.

To revise the order of the circuit court, the sheriff has prosecuted a writ of error.

Blount, for the plaintiff in error.
Peck & Clark, for the defendant.

COLLIER, C. J.—A sheriff who has collected money on executions in favor of different plaintiffs, each of whom is claiming a priority, may seek the advice and direction of the court as to its application; but the order which may be rendered thereupon, cannot be regarded as conclusive upon the rights of parties whose interests are affected, or afford a warrant for the action of the sheriff; unless they are all brought before the court by notice, or voluntarily appear. When therefore, the sheriff is in doubt as to the appropriation of money collected, he should make a statement of the facts, and ask the appropriate order; and that

this may be obligatory upon all concerned, they should be duly notified, that they may come in, make themselves parties, and submit their claims to the court for decision. When this course is pursued, the proceeding assumes the form of a legal controversy; and any person appearing to be interested may have the matter reviewed on error. [Wheeler & McCurdy v. Kennedy, 1 Ala. Rep. N. S. 292. See also, Zurcher v. Magee, 2 Ala. Rep. N. S. 253.]

In the present case the sheriff himself does not appear to have submitted a motion to the court for the purpose of his own protection, but it was made by a plaintiff in two of the executions.—No such motion was authorised by law. If the plaintiff in the executions had so elected, he might have moved under the statute, against the sheriff, to compel him to pay over the amount collected thereupon; and if judgments had been rendered against the sheriff he might have sued out a writ of error. But the order we are called on to revise is not definitive of the rights of the parties, is wholly unauthorised, and does not afford a warrant for an execution. If it had been made upon the application of the sheriff for advice, it would have been alike inconclusive, and could not have been reviewed upon any direct proceeding by him; but to have given to it the dignity of a judgment, parties should have been made in the manner we have indicated.

The writ of error must be dismissed.

REPORTS

OF

CASES ARGUED AND DETERMINED,

JUNE TERM, 1843.

☞ The Hon. HENRY GOLDTHWAITE resigned his seat upon the Bench, on the first day of this Term; and the Hon. C. C. CLAY was appointed by his Excellency to fill the vacancy, on the 13th June—being the eighth day of the Term.

CHEATHAM v. YOUNG.

1. It is not indispensable for a party, against whom a recovery at law has been obtained, on a contract founded on a gaming consideration, to shew any reason why he did not make a defence in that forum, to entitle him to come into chancery, and obtain relief.

ERROR to the Chancery Court at Florence.

In this case, a bill was filed by Cheatham, in the court of chancery, holden for the sixth chancery district of the northern division, to enjoin a judgment at law, obtained against him by Young, in the circuit court of Lauderdale. The bill charges that Young had an open account against the complainant, for money won at cards; that complainant acknowledged his indebtedness to the defendant in the sum of $250, on said account, in the presence of one David Young, (brother of the defendant) at the same time stating that it was on a gaming consideration; that complainant paid defendant, in part of said account $170, in a note for that amount held by him on the defendant; that at the time of said payment, complainant was ignorant of any fraud or unfairness, but afterwards ascertained that defendant had cheated and swindled him, by stocking the cards, and determined not to pay the balance of said claim; that defendant brought the action at law against him on said account, and complainant expected to prove the illegality of the consideration by the said David Young, the only witness who could prove the promise of payment.

That said David Young well knew the illegality of the consideration, on which said claim was founded, but to the surprise and disappointment of the complainant denied such knowledge on his examination as a witness; that complainant could not prove the illegality of said consideration by any other witness, and would have filed a bill for a discovery, but for his confident belief that he could prove it by said witness. An

injunction was granted. The defendant demurred to the bill for want of equity. The demurrer was sustained—but leave to amend was granted. An amended bill was filed, but only amplified the allegations contained in the original, without changing its character materially; and at a subsequent term the bill was dismissed. The complainant prosecuted a writ of error from this decree, and made the following assignment:

1. The court below erred in sustaining the defendant's demurrer to said bill.

2. The court erred in dismissing said bill.

McClung, for the plaintiff.

Parsons, *contra.*

CLAY, J.—This case was submitted by the counsel of the parties without argument, and without any brief; hence the court is left to determine the questions presented upon the record, without any intimation of the particular ground on which the decree of the court below was predicated, at least, so far as regards sustaining the demurrer to the bill, which seems to have decided the fate of the cause. In regard to the general question, whether the court of chancery has jurisdiction of cases arising on contracts, founded on gaming consideration, there can be no doubt. It has been given by express statute, and its exercise has been repeatedly sanctioned by this court. The bill charges, not only, that the sole consideration of the promise, on which the judgment at law was recovered, was for money won at cards; but also charges that the defendant practised upon him a fraud, in playing the game. Here are two grounds, either of which would be sufficient to give jurisdiction to the court of chancery, if there be no sufficient objection to the time and manner of the complainant's application for relief. The demurrer to the bill admits the truth of all its allegations, and virtually denies the complainant's right to the relief sought, notwithstanding such admission.

It may be insisted that the complainant had a good legal defence, which might have availed him on the trial of the action at law, and that he has lost his remedy by failing to make his defence before that tribunal. It may be admitted that such is a sound general principle, as to the right of a party, who has been

sued at law, to come into a court of chancery; yet we are not prepared to say that the bill does not shew a sufficient excuse for a failure to make that defence in the case before us. The bill shews that David Young was the only witness who could prove complainant's promise to pay the money, for which he was sued, alleges that the promise, made in presence of said witness, was accompanied by an explanation, shewing that its consideration was a gaming one; that complainant relied with confidence on proving the illegality of the consideration by said witness; and, therefore, did not file a bill for discovery, as he would otherwise have done. It is thus apparent, that the complainant had a well founded expectation, that he would be able to prove his matter of defence, and that he was disappointed, and *surprised* at the failure of the witness to give such evidence. According to the allegations of the bill the complaimant's reliance on David Young to prove the illegality of the consideration was reasonable; with that expectation he could not have called on the plaintiff at law for a discovery, his failure could not be foreseen, nor anticipated; consequently, we cannot impute to him such neglect, as would preclude him from relief in chancery.

But, independently of this view of the subject, the act of 1812, [Aik. Dig. 286, § 8,] and the construction heretofore given to it by this court, are decisive of the question. The section alluded to, is in these words: "The courts of equity shall have jurisdiction *in all cases of gambling consideration*, so far as to sustain a bill for discovery, or to enjoin judgments at law." In the case of Fenno, et al. v. Sayre & Converse, [3 Ala. Rep. N. S. 458 to 480,] the court said, "the obvious design of the act, was to increase the facilities of the loser of money at any unlawful game, to avoid its payment. Previous to its passage, the winner could not be compelled to discover, in answer to a bill in equity, that a contract, the subject of litigation, was founded on a gaming consideration, when an affirmative response would subject him to a penalty, or a crim nal prosecution. [Story's Eq. Plead. 466–7.] To take from the winner, the right to refuse to answer, was one object of the statute. Anterior to the act, a party against whom a judgment was recovered, upon a contract obnoxious to the law against gaming, was not entitled to go into equity, without showing some excuse, for the failure to avail himself of a legal defence,

to open the door of chancery, in such cases, *although the opportunity of defending at law had been neglected*, was the only additional end proposed by the statute."

According to the doctrine thus laid down, it is not indispensable that a party against whom a recovery at law has been obtained, on a contract founded on a gaming consideration, to shew any reason why he did not make his defence in that forum, and it is difficult to conceive any other motives than those adverted to by the court, in the case just cited, for the enactment of the law referred to. The Legislature declared as long ago, as the year 1807, [see Aik. Dig. 209,] that *all contracts*, whatsoever, "where the whole, or *any part* of the consideration" is "for money or other valuable thing whatsoever, laid or betted at cards" &c., "shall be *utterly void*, and of no effect, to all intents and purposes whatsoever." The enactment of 1812, aboved noticed, was in furtherance of the policy thus indicated, to discourage and suppress gaming, and to facilitate the means of giving effect to the former act, as annulling and rendering utterly void, the class of contracts arising out of such illegal, immoral, and vicious practices, and the construction it has received is but conformable to the manifest intention of the Legislature.

Let the decree of the court below be reversed, and the cause remanded for further proceedings.

BLANN v. BEAL.

1. In a *qui tam* action against the clerk of the county court for the penalty for issuing a license to marry a female under the age of eighteen years, without the consent of the parent or guardian, the plaintiff is not bound to prove the negative averments of the declaration that no consent to the marriage was given.
2. The record of the consent of the parent or guardian which the clerk is, by the statute, required to make, may be given in evidence by him, to show *prima facie* that consent was given.
3. A memorandum shown to have been made by the father of a child, of the time of its birth, would, after his death, be evidence of the date of its birth, as a declaration *ante litem motam;* but not if the father were living and able to testify.
4. If the father by bringing a suit, in which it becomes necessary to prove the age of the child, is thereby ineapacitated from being a witness, he eannot introduce the secondary evidence of his own declaration of the time of its birth, although he may be the only witness who can prove the fact.

ERROR to the Circuit Court of Dallas.

This was an action *qui tam*, by the defendant in error against the plaintiff in error, as clerk of Dallas County Court, for issuing a license to marry a daughter of the defendant, without his consent. The declaration contains two counts. The first count charges, that whereas the said defendant so being said clerk of said county, and by virtue of his office register of the orphans' court of said county, heretofore, to-wit, on the 27th November, 1840, at, &c. did, as said register, grant and issue a marriage license for the celebration of the rites of matrimony between one William C. Beal and Maria T. Beal, daughter of said plaintiff, and an infant at that time, within the age of eighteen years, which said license is in the words and figures following, &c.; and the said plaintiff further saith, that at the time of issuing said license, the said Maria was an infant within the age of *nineteen* years, at, to-wit, &c.

The second count charges the license to have been issued by the register "without the consent of the said plaintiff, given personally before the said register for the celebration of such marriage, *and* without due proof being made to said register by the oath of at least one credible witness, that said plaintiff, the father

of said Maria, infant as aforesaid, did sign a certificate, giving his consent to the celebration of such marriage, &c."

A demurrer was put in to the entire declaration, which the court overruled.

In the progress of the trial a bill of exceptions was taken, by which it appears that there was no proof adduced, whether the parent or guardian of the female had given his consent to the register, either personally or in writing, or whether proof of such fact was made by any witness before the register; or that such was not the fact, the defendant insisting that the burthen of proving the want of consent, or want of proof thereof, lay upon the plaintiff; but the court ruled, and so instructed the jury, that the burthen of proving the affirmative lay upon the defendant; to which he excepted.

To prove the age of the female, the plaintiff introduced a book entitled the Life of La Fayette, upon a blank leaf of which were some entries relative to the age of the female, and others of the family, tending to prove her under the age of eighteen at the time the license issued. The proof relative to the book, and the entries thereon, was the testimony of a witness, who swore that the entries were made in the hand writing of the plaintiff, that he had seen them some eight years ago, several years after this female was born, and that the book was shewn to him as the family register. The defendant objected to the introduction of this evidence, but the court permitted it to go to the jury; to which the plaintiff excepted.

The jury found for the plaintiff, and the court rendered judgment "that the plaintiff recover from the defendant the said sum of five hundred dollars, the debt in the declaration mentioned, together with his costs, &c."

The assignments of error bring to view,

1. The judgment of the court on the demurrer to the declaration.
2. The several matters set out in the declaration.
3. The judgment rendered by the court.

Evans and Hunter, for plaintiff in error.—The first count is bad, because there are two inconsistent and repugnant allegations in regard to the age of the female, and it is not therefore shown that she was not of the age which dispensed with the

consent of the parent or guardian. The second count is bad, from the use of the word "*and*," instead of "*or*" in the allegation that no consent was given, thereby imposing on the defendant the proof of both modes of consent. [Gould on P. 154.]

The introduction of the record of births and marriages, was insufficient, because it is not shown that the person making it is dead or beyond the jurisdiction of the court. It cannot be evidence in this cause, as it was made by the plaintiff himself.—[Greenleaf's Ev. 118; 1 Starkie's Ev. 66; Bul. N. P. 255; 3 Starkie, 1100, 1115.

As to the *onus probandi*, it is an established principle, that a public officer discharging a public duty under his official oath, is presumed to do his duty, until the contrary appears. [1 Phil. Ev. 193, 195; Bul. N. P. 258; 19 Johns. 345; Hardin's Rep. 348; 1 Chitty's Crim. L. 558.] The cases cited on the other side from 9 Porter, 326, 633, are unlike this case. That was a statute, making an act unlawful generally, with an exception in favor of those who obtained a license; it is therefore the exception which creates the offence. [2 Russ. on Crimes, 694; 3 B. & Pul. 303; 5 M. & S. 206.]

The fact to be proved is not more within the knowledge of the defendant than the plaintiff, and therefore, although a negative, must be proved by the former. [Greenleaf Ev. 90.]

G. W. Gayle, *contra*.—The demurrer to the declaration is to both counts generally, and the second count is certainly good.

The defendant must bring himself within the exception of the statute. by proving the consent; he holds the affirmative of this issue. The cases cited from 9th Porter, 326, 633, are expressly in point; as are also 2 Baily, 151; 1 McCord, 573; 19 Wendell, 363 The proof is more in the power of the defendant than the plaintiff, and must therefore be produced by him. [1 Philips' Ev. 90; 2 Gallison, 285; 1 Johns. 513.] Under the statute of this State [Ark. Dig. 306] the record of the consent is evidence for him.

The record of births was proved to have been received by the family, and admitted to be correct, many years before this suit was instituted, and was therefore correctly admitted.

ORMOND, J.—We do not consider it necessary to examine critically the first count of the declaration, as the demurrer is to

both counts, and the second count is certainly good. The statute prohibits the clerk from issuing a license to marry, when the male is under twenty-one, or the female under eighteen years of age, unless "the consent of the parent or guardian of such infant shall be personally given before the said register, *or* due proof made to him by the oath of at least one credible witness." The declaration alleges that the license was issued by the register, without the consent of the plaintiff, given personally, *and* without due proof being made by the oath of at least one credible witness, that the plaintiff had consented to the marriage.

The objection taken is, that the employment of the copulative conjunction *and*, cast on the defendant the necessity of proving both modes of excuse pointed out in the statute, for issuing a license to marry an infant; but we are clearly of opinion that the objection is untenable. It was necessary for the plaintiff to negative the existence of those facts which would authorize the register to issue a license to marry the daughter of the plaintiff under the age of eighteen years, and this is done as appropriately by the term *and* as *or*. The allegation is, that neither of the facts exists which would authorize the license to issue, and this would certainly be disproved, by showing that either existed, and afford a complete justification to the clerk.

The question upon whom the burthen of proof of negative averments, lies, in cases like the present, appears not to be precisely settled. The point was presented to this court in The State v. Gaus, [9 Porter, 633.] That was an indictment for retailing spirituous liquors, without license, and this court, after remarking upon the contrariety of decision upon the point, held, that it was incumbent on the defendant to make out his excuse by proofs.

It has, however, been repeatedly held, both in England and in this country, that where the charge imports a criminal neglect of duty, the proof of the negative averments must come from the prosecutor, unless a different rule is provided by statutue. [United States v. Hayward, 2 Gallis. 485, 500; United States v. Gooding, 12 Wheaton, 460; Commonwealth v. Stow, 1 Mass. 54.] To the same effect are many of the cases cited by the counsel of the plaintiff in error.

Under the influence of this rule of law, so well established, and so reasonable in itself, we would feel ourselves bound to hold that the *onus* was with the plaintiff, if the statute had not as we think

it has, provided a different rule, as the charge here clearly imports a criminal neglect of duty on the part of the clerk. That portion of the statute authorizing marriage licenses to be issued by the register or clerk of the county court, material to this enquiry, is as follows: "and if the male intending to marry, be under the age of twenty one years, or the female under the age of eighteen years, the consent of the parent or guardian of such infant, shall be personally given, before the said register, or due proof made to him by the oath of at least one credible witness, (which oath the said register is hereby authorized to administer) that such parent or guardian did sign a certificate then produced, giving his consent for the celebration of such marriage; whereupon the said register shall *record the consent personally given as aforesaid, and issue a license, and record the same, &c.*"

The consent then, it appears, of the parent or guardian, personally given, or the oath of a credible witness to the genuineness of a written consent, is to be made a record of the court, for no conceivable purpose, as we think, but for the protection of the clerk, and as a record, is doubtless evidence for him, at least *prima facie*, of the facts therein contained. We cannot presume, in the absence of proof, that this record was not made, but must presume, that the clerk performed the duty enjoined on him by the statute. Whether if he neglected to place the facts on record, he would be precluded from making other proof, that the consent was given, we need not now determine.

There is great reason and good sense in this provision of the statute. The parent or guardian are the persons most likely to feel incensed at such improper conduct of the clerk, and the only persons who would probably take such an interest in the matter as to commence an action for the penalty, and if they are incapacitated from doing so by being compelled to be witnesses, the statute would soon become a dead letter. Whilst on the other hand, this view of the statute affords ample protection to the clerk who conforms his conduct to the plain directions of the law.

An exception to the general rule, that hearsay is not evidence, obtains in questions of pedigree, where such testimony is received under certain restrictions. So also, the declaration of a parent as to the time of the birth of a child made *ante litem motam*, are after his death, admissible as evidence, upon the ground, that he must know the fact and has no motive to misrepresent it. [Berk-

ley Peerage case, 4 Camp. 401; Rex v. Erith, 8th East, 542; Goodright v. Moss, Cowp. 591.] In England, this is considered as secondary evidence, and is therefore never admitted when the declarant is alive and can testify. [Rex v. Wedge, 5 Car. & Payne, 298; 3 Starkie on Ev. 1102.]

In the U. States some uncertainty appears to prevail as to the admission of such evidence when the declarant is alive and can testify, but the weight of authority is clearly that the declarant must be dead, or beyond the process of the court. In Elliott v. Piersol, [1 Pet. 337,] the court confine the rule to the declarations of "aged and deceased members of the family." That the declarant must be dead before his declarations can be given in evidence, See Chapman v. Chapman 2 Conn. 347; Waldrow v. Tuttle, 4 N. H. 371; Banert v. Day, 3 W. C. C. R. 243; 4 ib. 186; Taylor v. Hawkins, 1 McCord, 165; Leggett and Wooster v. Boyd, 3 Wend. 376.

The admission of this species of evidence has been submitted to from the necessity of the case, and to prevent the failure of justice, which would frequently happen, especially in questions of pedigree, if the testimony of eye witnesses were required to establish remote facts. Upon principle, therefore it must be considered in the nature of secondary evidence; and to authorise its introduction it must be shown that the latter testimony is not within the power of the party to produce. The memorandum offered in evidence in this case, made by the father, of the birth of the child, long anterior to this controversy, would, if he were dead, be evidence of the fact stated in it, but we feel very clear, that both on principle and authority, it cannot be admitted, the father being alive and within the reach of the process of the court. To permit the memorandum to be read as evidence to establish a particular fact, when the person who made it is alive, and competent to establish the fact itself, would be to overturn one of the most salutary rules of evidence—that the best evidence must be produced.

It is also open to observation that it is scarcely possible to suppose that there are not living witnesses, who could establish the fact of the age of the daughter of the plaintiff; and to permit the rule to be relaxed in this case, would be to innovate upon a most important rule without the justification of necessity, which has led to its relaxation in questions of pedigree, to prevent a fail-

ure of justice, from the difficulty, if not impossibility of proving facts of ancient date by living witnesses.

Nor is the case varied because the father who made the memorandum is plaintiff in the cause, and therefore, incompetent to testify in his own behalf. As already stated, it cannot be supposed that he is the only witness who can prove the young lady's age; but if such be the fact, he has voluntarily disabled himself from giving testimony, and cannot ask a relaxation of the rules of evidence, the necessity for which has been caused by his own act. This principle was declared by this court in the case of Bennet v. Robinson, [3 S & P. 240] where the point was elaborately considered and the secondary evidence rejected. For this error, the judgment must be reversed, and the cause remanded.

HALL'S EX'RS v. CLICK, ET AL.

1. The equitable lien of the vendor of land, cannot be enforced against the vendee, at the suit of an assignee of the note given for the purchase money, where the note was assigned by the vendor without recourse.

WRIT of Error to the Court of Chancery sitting at Talladega.

The plaintiffs in error, filed their bill against the defendants, setting forth with particularity, that their testator had sold property to the defendant Isaac Dickerson, for the sum of twenty-five hundred dollars, and received in part payment, a note made by Henry Click, for nine hundred and sixty-eight dollars. That this note was given in part payment of a tract of land, purchased by Click of Dickerson, and was received by the testator without Dickerson's indorsement, upon an assurance, that if it could not be collected of Click, he (D.) would pay it. It is then alleged, that Click has been sued, judgment obtained, and an execution returned "no property found:" and further, Click is insolvent.

The prayer so far as it need be noticed is, that the complainants may be decreed to have an equitable lien for the payment of Click's note, on the land purchased by him of Dickerson.

Click, Dickerson and some of the other defendants unite in an answer, admit the consideration of Click's note to be as alleged, but affirm that it was received by the complainant's testator, of Dickerson, *for better for worse, without recourse on him* for its payment. They conclude their answer with a demurrer to the bill.

The chancellor adjudged, that the complainants were not entitled to assert the lien which Dickerson may have had for the payment of Click's note; more especially as Click had conveyed the land in trust, for the payment of debts, and dismissed the bill, at the cost of the respective parties.

S. F. Rice, for the plaintiff in error.

L. E. Parsons, for the defendant.

COLLIER, C. J.—It is a principal of law about which there is no controversy, that the vendor of real estate retains a lien for the unpaid purchase money, unless he has expressly or impliedly waived it; and that this lien will be enforced against the vendee and all persons claiming under him with notice, although a deed has been executed conveying to the vendee the legal title. [Foster v. The Trustees of the Athenæum, 3 Ala. Rep. N. S. 302; Bayley v. Greenleaf, et al. 7 Wheat. Rep. 46; Brown et al. v. Gilman, 4 Id. 255; 1 Mason's Rep. 191; Lupin v. Marie, 6 Wend. Rep. 77; Hatcher's adm'rs v. Hatcher's ex'rs 1 Rand. Rep. 53; Elliot v. Edwards, 3 Bos. & P. Rep. 183; Walker v. Preswick, 2 Ves. Rep. 622; Mackreth v. Symmons, 15 Ves. Jr. Rep. 337.] In such case it is said, the vendee becomes a trustee for the vendor for so much of the purchase money as has not been paid. [Coote on Mort. 248.]

The law, when carried to this extent is not controverted, but it is insisted that Dickerson having transferred the note of Click to the plaintiff's testator under an express agreement, that he was not to be liable for its payment, renounced the equitable lien to which he was entitled for his security. To the consideration of this argument we now address ourselves. In Jackman v. Hallock, et al. [1 & 2 Ohio Rep. 147,] a bill was filed to enforce an

equitable lien on land, at the suit of an assignee of notes taken by the vendor for the purchase money. The court admitted that there was a trust as between the vendor and vendee, and persons claiming under the latter with notice; but say, "this trust does not and cannot attach to notes given for the purchase money. It is an equity between the vendor and vendee, which the notes cannot affect, but which exists in the same character, whether a note be given or not. This equity arises to the vendor for his own safety, but it cannot be transferred to another. No law has made it the subject of conveyance on assignment. It cannot follow the notes, because the assignee takes in them a legal interest, and the assignment does not purport to transfer, and could not transfer an equity existing independent of them." Lord Hardwicke in Pollexfen v. Moore, [3 Atk. Rep. 272,] remarked that "the equity will not extend to a third person;" but it is supposed greatly weakened the force of the *dictum*, by the decree which he rendered, so marshalling the assets as to give to the complainant all the relief she asked. [Trimmer v. Bayne, 9 Vesey, Jr., Rep. 210.]

In Tiernan v. Beam, et al. [1 & 2 Ohio Rep. 465,] the equitable lien was enforced in favor of the vendor's devisee. The court distinguished that case from Jackman v. Hallock, et al. by considering the devisee as merely the representative of his testator, whose death could not have divested him of a right without any fault or act of his. [See also Sugden on Vend. 392, 398, and 2 Mad. Ch. 105; Henry v. Collins, 4 Litt. Rep. 289; Johnstone v. Gwathmey, 4 Litt. Rep. 317.]

In Schnebly and Lewis v. Ragan, [7 Gill & Johns. Rep. 120,] a bill was filed by the assignee of promissory notes taken by the vendor of land to enforce the equitable lien. It appeared that the notes were assigned by a special endorsement, and without recourse in any event to the assignor. The court say, "we think, that when the notes were assigned by Lewis to Schnebly, with an express stipulation, that he was in no event to be responsible for the payment of them, the effect and operation of the agreement, produced an extinguishment of the vendors lien, because so far as he was concerned, it amounted to a payment and satisfaction of his claim. The lien was intended to secure the purchase money to the vendor, and the assignment of the notes without responsibility for their ultimate payment, it is presumed is equally

as beneficial to him, as if he had received the amount of them in money." In White v. Williams, et al. [1 Paige's Rep. 502,] the Chancellor intimates that the equitable lien of the vendor will not pass to an assignee by implication or construction, but may by an express agreement; and the vendor can only be considered as retaining the lien (if at all) because he is liable on his endorsement. He proceeds, "in a recent case, where the vendor had negotiated the note, but was obliged to take it up himself when it fell due, Lord Eldon, sustained the claim of the original vendor to a lien on the land. [Exparte Loring, 2 Roses cases, 791.] But I am not aware of any case where the assignee of the note, has been permitted to sustain such a claim, on an implied agreement to assign the lien."

The facts of this case relieve us from the necessity of considering whether, in any case, the equitable lien of a vendor should be enforced at the suit of an assignee; it is quite enough to say that there has been no assignment of the lien, and that there is no liability, so far as the bill and answers inform us on the part of Dickerson, to pay Click's note. Whether the cause was heard on the bill and answers, by consent, is entirely unimportant, in order to let in the material parts of Dickerson's answer as evidence. The bill alleges, that although Dickerson did not endorse Click's note, yet he agreed to pay it, if it could not be collected of the latter. This allegation is explicitly denied; and not in terms which can warrant the inference that there was intended to be an assignment of the lien. The case cited from Gill and Johnson, seems to us to be so consonant to reason, and so much in harmony with the nature of the security which the law implies in favor of the vendor, that we do not feel authorised to reject it as an authority.

It is quite unnecessary to extend this opinion by showing a want of similitude between a mortgage in fact, evidenced by writing, and the lien which equity raises in favor of the vendor of real estate. In the latter case, there can be no doubt but the assignment of the debt operates a transfer of the mortgage as an incident.

Without adding any thing further, the decree of the court of chancery is affirmed.

CLAY, J. not sitting.

CAREW & COATES v. NORTHRUP.

1. A note payable to A B, or bearer, will not sustain an action in the name of any one but the payee, or his assignee; nor will such a note be a good set-off in favor of any one, except the payee, or his assignee.

ERROR to the Circuit Court of Autauga.

This was an action of assumpsit, brought by the plaintiffs against H. M. Northrup & Co. on a promissory note given by the defendants to the plaintiffs for the payment to them, or bearer, of two hundred and seventeen 65-100 dollars, twelve months after date. The declaration was filed against H. M. Northrup alone, and the action discontinued as to Andrew B. Northrup, on whom process was not served. The defendant pleaded, in short, set-off, non-assumpsit, and payment. On the trial of the cause, it appears by a bill of exceptions, that the plaintiffs introduced, as evidence, the promissory note described in the declaration.

The defendant then offered to read, as a set-off, a note, of which the following is a copy:

"$100. "West Wetumpka, 13th March, 1837.

"Fifteen months after date, we promise to pay Francis Gray, or bearer, one hundred dollars, for value received, if not punctually paid, interest from date.

"CAREW & COATES."

The defendant having proved that said note was made by the plaintiffs, and having proved that said last note was in possession of defendant long before the commencement of this action—the plaintiff objected to the defendant's reading said last note, *because it was not endorsed by the payee, Gray.* But the court overruled the objection, the plaintiffs excepted to the opinion of the court, prosecuted his writ of error, and now assigns the following:

There is error in said record, in the admission upon the trial, of the note made by plaintiffs, as set out in the bill of exceptions.

Pryor, for plaintiff in error.

CLAY, J.—The question here raised, is settled by reference to the act of June 30th, 1837; [Meek's Sup. 108, § 1. It is in the following words:

"That from and after the first day of July next, all bonds, bills, or notes, which shall be made payable to any person or persons, or bearer, or to any corporation, or bearer, shall have the effect of creating an obligation, or liability in favor of the corporation, or person or persons, only, to whom any such bond, or note, may be expressly made payable; and *no one but such corporation, or person, or persons, or their endorsee, or personal representative, shall have a right to maintain, in his own name, an action upon any such bond, bill, or note.*"

It is obvious, that to enable any other person but the payee, or obligee, of such a bond, bill, or note, to sustain an action in his own name, it must be indorsed—he cannot do so *as bearer.* [See Kinney v. Campbell, 1 Ala. Rep. N. S. 92.] The note offered, as a set-off, was not payable to the defendant, nor indorsed to him: a set-off is in the nature of a cross action, and can only be good in favor of one who could maintain an action upon it in his own name; consequently, the court erred in admitting the note offered by the defendant, as a set-off.

Let the judgment of the Court below be reversed, and the case remanded.

COKER, ADM'R, v. CROZIER.

1. If the defendant dies pending an action on the case, brought to recover damages for a fraud in the exchange of horses, it cannot be revived against his administrator.

ERROR to the Circuit Court of Cherokee.

This was an action on the case, brought by the defendant in error, against the intestate of the plaintiff in error, to recover damages for a fraud in the exchange of horses.

Pending the action, the defendant died, and the cause was revived against the plaintiff as his administrator. The jury having found a verdict against the defendant for eighty dollars, judgment was rendered against him for the damages and costs.

The assignments of error, are,

1. The revival of the judgment against the plaintiff in error.
2. The rendition of judgment against him.

MOORE, for plaintiff in error.
RICE, *contra.*

ORMOND, J.—The common law maxim that personal actions die with the person, has been modified in England, by the act of 4 Edward 3, c. 7, and in this state by the statute to be found in Aik. Dig. 260, § 6. "All actions of trespass *quare clausum fregit*, and actions of trespass to recover damages for injuries to personal property, may, if the plaintiff or plaintiffs die, be revived by his, her or their representatives, in the same manner as actions on contracts."

In the case of Nettles v. Barnett, [8 Porter, 181,] we held that this statute did not authorize the revival of a suit, brought for a trespass *de bonis asportatis* against the administrator of the *defendant*, who died pending the suit, but was confined to the case of the death of plaintiffs. We entertain but little doubt that the action brought in this case is within the equity of the statute,

though not within its terms, as the established construction of the act of 4th Edward, at the present day is, that although the word *trespasses* only is used, that it applies to all cases of injury to the personal property of the testator or intestate, in contradistinction to personal wrongs, as slander, or assault and battery, without regard to the form of action. But the remedy by the statute of 4th Edward, is given to the executor of the person injured, and has never been held to extend to the executors of the wrong doer. [Wheatly v. Lane, 1 Saunders, 216, note 1.] So, by our statute, the action may be revived in the name of the executor or administrator of the *plaintiff*, if he dies pending the suit, and we have already shown, that by the decision of this court, in the case cited, that in regard to those actions enumerated in the statute, the action cannot be revived against the representative of the defendant.

The action in this case is clearly within the common law rule, and not being provided for by statute, upon the death of the defendant the right of action was gone, and could not be revived against his representative. The judgment must therefore be reversed.

NANCE v. LARY.

1. Where one writes his name on a blank piece of paper, of which another takes possession *without authority therefor*, and writes a promissory note above the signature, which he negotiates to a third person, who is ignorant of the circumstances, the former is not liable as the maker of the note to the holder.

Writ of Error to the Circuit Court of Tuskaloosa.

This was an action of debt on a bill single, made by the defendant and George N. and Joseph H. Langford, on the 29th of August, 1838, for the payment of one thousand dollars to the plaintiff or bearer, ninety days thereafter. The cause was tried

on the plea of *non est factum*. The plaintiff excepted to the ruling of the court, by which the evidence adduced by the defendant was adjudged to be admissible, and then demurred to the sufficiency of the evidence to make out the defence. Upon the production of the writing sued on, the defendant admitted the signature was in his hand writing, and proved that the word "seal," written in the scroll was not. It was also proved, that about March, 1838, the defendant agreed to become a co-surety with George N. Langford, in a constable's bond of Michael Whatley, then of Autauga county, that he went to the store of Langford, for the purpose of executing the bond, when the latter produced a sheet of paper for him to sign in blank—it being the intention of all the parties that the paper should then be thus signed, and the bond afterwards written out by a competent person. The defendant accordingly signed his name in blank; whereupon Langford suggested that the signature was so far from the bottom of the paper, that there might not be room for the bond to be written above it, and produced another sheet for affiant to sign, so as to leave sufficient room for the intended bond. Langford, with apparent carelessness, slipped the first sheet aside, and signed the other with the defendant, who carried it to the clerk of the court to be filled up, leaving the former with Langford, under the impression that it had or would be destroyed. Subsequently, Langford caused the note in controversy to be written over the blank signature of the defendant, retained by him; and the defendant has derived no benefit therefrom.

The court decided, that the evidence was sufficient to bar a recovery, and rendered a judgment for the defendant.

Peck, for the plaintiff in error, cited Roberts v. Adams, [8 Porter's Rep. 297,] Putnam v. Sullivan, [4 Mass. Rep. 45,] Herbert v. Huie, [1 Ala. Rep. 18, and cases there cited.] He contended that Langford was not guilty of a forgery, but, at most, of a fraud; and as the defendant had enabled him to use his name either by design or through carelessness, he must make good the consequences to the plaintiff, to whom no blame is attributable.

Huntington, for the defendant.—The demurrer admits that the signature of the defendant was used without any authority from him; and he is no more bound to pay the note, than if the

blank on which it was written had been purloined, or found by the party using it. In this view Langford was guilty of a forgery—1st, in writing the note—2d, in affixing a seal to the defendant's name. [3 Inst. 371; Bacon's Ab. tit. Forgery, A.] The cases relied on by the plaintiff, are unlike the present. There, the paper was signed with the intention that it should be used; or least, such was the inference. Here it was substituted by another paper, and was never intended to be thereafter used for any purpose.

COLLIER, C. J.—It is insisted for the plaintiff that the liability of a person who writes his name on a blank piece of paper, to pay a note or bill written over it, does not depend upon the fact, that the paper has been signed for such purpose, but it rests upon the ground, that by thus signing the paper a third person, without any knowledge of the extent, or want of authority, has been imposed on. We are not aware of any case in which the law on this point has been laid down in terms so latitudinous. Sumner v Parsons, which is cited by Mr. Dane, in his Abridgment, goes further than any other case we have noticed. There, Parsons wrote his name on a piece of paper and gave it to Brown; Brown made a note on the other side, for the payment of money to Sumner; Sumner then wrote a guaranty of the note over Parsons' signature, and sued him thereon. The court held, that Sumner had a right to fill the indorsement, so as to make Parsons a common indorser of the note, with the rights and obligations of such, or a guarantor, or warrantor, or surety, liable in the first instance, and in all events, as a joint promisor would be. The learned author observes, that, "it must be admitted, that this case was carried as far as any case had gone, and on the review, the court was not unanimous, and it has since been questioned."

Chitty, in his treatise on bills, seems to place the liability of a party who signs a blank piece of paper, upon the ground, that he confers an authority, or reposes a confidence in the person to whom it is delivered; and deduces the conclusion that if the extent of the authority is unknown to him who receives a security written thereon, the party signing it, shall be liable to the full amount. [9 Am. ed. 33, 240. See also Story on Bills, secs. 53, 222, and cases cited in the notes.]

Collis v. Emmett, [1 H. Bla. 313,] and Russell v. Langstaffe,

Doug. [Rep. 496,] are leading cases on this point, and in both of them, was an authority given; in the first to draw a bill, and in the latter promissory notes. In the cases decided in this court authority was conferred by the persons signing the blanks to use them for some purpose, and the liability is placed upon the ground that though the power was abused, innocent holders of paper should not be the losers. [Brahan & Atwood v. Ragland, et al. 3 Stew. Rep. 260; Roberts v. Adams, 8 Porter's Rep. 297; Herbert v. Huie, 1 Ala. Rep. N. S. 18.] So Putnam v. Sullivan, [4 Mass. Rep. 45,] is a case in which confidence was reposed. There, it appears, that the defendants left their names indorsed in blank on papers, with their clerk, for the purpose of having notes of a certain description written thereon, and a third person obtained those papers by false pretences, and wrote notes thereon, signed by himself as promisor to the indorsers, and passed them to a third person, who had no notice of the facts; the defendants were held liable as indorsers. This case and Sumner v. Parsons, go quite as far, if not beyond any other that has fallen under our notice, yet they are distinguishable from the case at bar in one particular, that has been regarded as very important. In each of those cases, the party signing the paper placed it in the hands of a third person; in the former, to write notes on; in the latter, the purpose of the delivery is not shown. The latter was not concurred in by the entire court, and has since been questioned; the former, in our opinion, presses the law as far as it is allowable. In the present case, there is no just pretence, that the defendant ever confided his signature to Langford. Although he signed the paper with the intention that a bond should be written on it, that intention was changed and so expressed and understood by Langford and others interested, before he left the room, and the paper thrown aside without any design that it should be used.

The making of the note by Langford, was not a mere fraud upon the defendant, it was something more. It was quite as much a forgery as if he had found the blank, or purloined it from the defendant's possession. If a recovery were allowed upon such a state of facts, then every one who ever indulges the idle habit of writing his name for mere pastime, or leaves sufficient space between a letter and his subscription, might be made a bankrupt by having promises to pay money written over his signa-

ture. Such a decision would be alarming to the community, has no warrant in law, and cannot receive our sanction.

The judgment of the circuit court is consequently affirmed.

CLAY, J.—Not sitting.

IVEY v. PIERCE, USE, &c.

1. When a sum exceeding twenty dollars is claimed by the plaintiff, in a proceeding before a justice of the peace, the defendant cannot be permitted to prove a credit of twenty dollars, or under, by his own oath.
2. The act of 1839, in Meek's Supplement, p. 113, § 4, does not in this respect, change the act of 1814. [Aik. Dig. 294, § 11.]

ERROR to the Circuit Court of Lowndes.

This case originated before a justice of the peace, who issued his warrant against the plaintiff in error, in favor of the defendant in error, in a plea of debt, due by note for the sum of thirty dollars. On the trial, the justice gave judgment in favor of the defendant in error for the amount of the note, including principal and interest, besides costs. Ivey appealed to the county court, where Pierce filed his declaration, or statement on the note, and on the trial, as appears by a bill of exceptions, Ivey, the defendant, there, offered to prove a payment to the amount of $20 by his own oath, which the court refused to permit, on the ground that the note, which was the foundation of the action, exceeded twenty dollars. The defendant excepted to this opinion of the court—a verdict was given for the plaintiff, and judgment rendered accordingly. To reverse this judgment, Ivey prosecuted a writ of error to the circuit court, and there assigned for errors:

1. In not permitting the plaintiff in error, who was defendant in the court below, to prove by his own oath, a payment of plaintiff's demand to the amount of twenty dollars.

2. In rejecting the evidence offered, as stated in the bill of exceptions.

3. In not permitting the plaintiff in error to swear in the case to an account not exceeding twenty dollars, although he did not controvert the demand on which the action was founded.

The circuit court affirmed the judgment of the county court; from that judgment a writ of error was prosecuted to this court, and it is now assigned:

1. That the circuit court erred in affirming the judgment of the county court.

BOLING, for plaintiff error.

CLAY, J.—The assignment of error here, is, that the circuit court erred in affirming the judgment of the county court, and consequently, presents the same questions made before that court. The first two assignments bring in question the same thing; that is, the opinion of the court rejecting the defendant's own oath, offered to prove a credit to the amount of twenty dollars. We think the law, and the general practice under it, both sustain the opinion of the court. The section which applies, is in the following words:

"If the sum claimed be twenty dollars or under, the justice of the peace may, at the trial of the cause, proceed to examine the plaintiff and defendant on oath, and give judgment, as to him the right of the cause may appear; and in all cases where the sum of money claimed, exceeds twenty dollars, the oath of neither party shall be admitted, but the same evidence shall be required by every justice of the peace, as is required in the superior court." [Aik. Dig. 294, § 11.]

As it was held in the case of Lock v. Miller, [3 S. & P. 13, 14,] "this statute is an innovation upon the common law, and therefore will not be extended farther than required by its letter." This statute only authorises the justice, or any other tribunal to which an appeal is taken, to examine the defendant when "the sum claimed" is twenty dollars, or under. By this is intended the sum claimed by the plaintiff in the commencement of the case; his claim is the only one made, and the act intended, within that amount, that the rights of both parties should be reciprocal—that either might give evidence. Here, the amount claimed by the

plaintiff was more than twenty dollars, and he could not be sworn, in any event. To suffer the defendant to give evidence, in such a case, would be to extend to him a privilege, which could not be allowed to the plaintiff, and not contemplated by the statute: and we think the general practice of the State has conformed to these views. It is well understood, that the common law rule of evidence denies to any one the right of being a witness in his own cause—it must be admitted to be a wise and safe general rule. When the Legislature deems it expedient to change it in any respect, it should be restricted, as laid down in the case above cited.

The 3d assignment of errors in the county court seems to have relation to the act of 1839. [Meek's Supp. 113, § 4.] But that act has no bearing on the question. It provides that "in all suits to be commenced upon accounts, for a sum not exceeding one hundred dollars, the oath of the plaintiff shall be received as evidence of the demand, unless the same be controverted by oath of the defendant, &c." The action here was *not* on an account; nor does the oath of the plaintiff appear to have been received as evidence; both of which circumstances must have existed to entitle the defendant to swear at all, under the provision referred to. This statute, too, is in derogation of the common law rule of evidence, and in the case of Bennett v. Armstead, for the use of Hair, [3 Ala. Rep. N. S. 597,] had already had the strict rule of construction applied to, which has been laid down, as applicable to the act of 1814, referred to in the foregoing part of this opinion.

Let the judgment of the court below be affirmed.

FOSTER v. McDONALD.

1. Where the holder of a bill of exchange resided in Mobile, and the endorser in Tuskaloosa, the deposite in the post office of the latter place, by an agent, of notice of the dishonor of the bill, will not be sufficient to charge the endorser, unless it actually comes to his hands.
2. Upon proof of these facts, a jury might infer that the endorser received the no-

tice if no countervailing fact is shown to destroy the presumption, and upon a demurrer to the evidence, the court will so decide.

3. Upon a demurrer to evidence, no objection can be taken to its competency.

ERROR to the County Court of Tuskaloosa.

Assumpsit in the court below by the defendant in error, as holder, against the plaintiff in error as endorser of a bill of exchange.

On the trial, the plaintiff read in evidence the bill sued on, which was drawn by one Moses P. Walker, in favor of the defendant, for twelve hundred and fifty dollars, negotiable and payable at the Bank of the State of Alabama. The bill was endorsed by the defendant, also Robert B. Walker, Dubose & Roff, and by Andrew Armstrong, cashier, the last endorsement being filled up to E. F. Comegys, cashier.

The plaintiff also read the protest of a notary at Tuskaloosa, showing that the bill was protested at maturity for non-payment. On the protest is the following certificate: "Notices of protest deposited in the post office same day, for the drawer and first two endorsers respectively at this place, and last two endorsers respectively, under cover addressed to Andrew Armstrong, Esq., cashier, Mobile." The plaintiff also proved that the bill was his property; that Dubose & Roff endorsed it as his agents, for the purpose of collection. That Armstrong had no interest whatever in the bill, but received and transmitted it to the cashier of the State Bank for collection; that E. F. Comegys, cashier of the Bank of the State at Tuskaloosa, received it from the branch at Mobile for collection, and on its dishonor returned it to Armstrong, by whom it was handed to Dubose & Roff, from whom he had received it—that McDonald was a resident of the city of Mobile, and Foster of Tuskaloosa.

To this evidence the defendant demurred, and the court rendered judgment on the demurrer for the plaintiff, from which this writ of error is prosecuted.

PECK & CLARK, for the plaintiff in error, argued that there were but three modes of giving notice to charge an endorser—actual personal notice; a notice left at the house, or place of business; and notice sent by the mail. That in this case, as the parties did not reside in the same town, the mail could only be re-

sorted to, to give notice by the holder on receiving information from his agent of the dishonor of the bill. They admitted that the agent might give notice, but as he could not give it directly to the defendant through the post office, the protest being made in the same place where the defendant resided, it was necessary to show that the notice came to the defendant's hands.

They also insisted that when an agent protested a bill in the same place where the defendant resided, he was required to give personal notice; and further maintained that the certificate of the notary, that he had placed a notice in the post office, was not legal evidence of that fact, as this was not such a case as the statute contemplated his certificate should be evidence of. They cited 3 Kent's Com. 74; 11 Johns. Rep. 258.

COCHRAN and PHELAN, *contra*, maintained that as the holder and endorser resided in different places, there was no necessity cast on the agent of the former, to give notice to the latter, but that he might do so, if he thought proper, as was decided when this case was, before the court. [3 Ala. Rep. 34.] That the only question was whether the defendants had received notice, and that under the evidence in the cause, the courts were authorized to infer that such was the fact, this being a demurrer to evidence. They cited 4 Ala. Rep. 148.

ORMOND, J.—This case was before this court at a previous term. [3 Ala. Rep. 34.] It then appeared from the record that the holder of the bill, and the person sought to be charged as endorser, both resided in this place, and we then held that a notice of the dishonor of the bill directed to the endorser, and placed in the post office in this town, was not evidence of the fact of notice. That the agent might have given notice to the endorser, and it would have been sufficient to charge him, but as the holder resided in a different place, it would have been sufficient if the agent had notified him of the dishonor of the bill, and that a notice of that fact from the holder to the endorser, placed in the post office, directed to the endorser at his place of residence, would have been sufficient.

The only difference between the case as now presented, and then, is, that it appears now that the holder is a resident of the city of Mobile, and that by the demurrer to the evidence, the court

is substituted for the jury, to ascertain the facts. The fact which the court below had to decide, and which is now devolved on this court, is whether the notice put in the post office at this place, came to the defendant's hands within a reasonable time, for it is admitted that if it did, although irregularly given, it will be sufficient.

It appears that the defendant resided in Tuskaloosa, at the time the notice was put in the office, directed to him, and we think the jury would have been authorized to infer that it came to his hands. Mr. Starkie, 1 vol. 14, in his admirable chapter of what evidence consists, remarks: "by facts and circumstances are meant all things and relations, whether natural or artificial, which really exist, whether their existence be perceptible to the senses or not." As mankind in the ordinary business or transactions of life have to form their judgments on probabilities, from their knowledge of the established order of things, so jurors are frequently compelled to decide upon those presumptions which are drawn from the established course and order of human affairs and dealings, and upon their knowledge of the habits and customs of mankind—and these presumptions are not the less facts, because not perceptible to the senses. Now we know that it is the established custom and habit of persons resident in a place, and especially the mercantile class, to resort frequently, if not daily, to the post office, for information from their private and individual correspondents, as well as for that which is derived from the public press. There is nothing to relieve the case from the natural presumption, that the defendant, like other persons, resorted to the post office, and like others, received the communications there deposited for him. It is not shown that he was absent from the place, or that by accident, or from any other cause, the letter was not delivered to him. We do not doubt, therefore, that the jury would have decided that the notice did come to the hands of the defendant.

We have previously remarked on the prevailing custom of demurring to the evidence, that if gentlemen will withdraw the determination of facts from the jury, and especially in those cases, where the facts, as in this, are not explicitly proved, but rest in presumption, "they must expect that the court will incline against them, in all cases where the tendency of the proof is doubtful." [McGehee v. Greer, 7 Porter 537.] By demurring to the evidence the defendant admitted every fact, and every conclusion

which the evidence conduced to prove, and we think the jury might legitimately have drawn the conclusion here stated. The case of Carson v. The State Bank at the last June Term, [4 Ala. 148,] is in many respects analogous to this.

It is further objected that there is no proof on the record that the notary put a letter containing the notice, in the post office, because his certificate to that effect on the protest is not proof of the fact. The authority of the notary to certify the fact of notice, is derived from a statute of this State, [Aik. Dig. 327, § 9,] which it is argued does not extend to such a case as the present.

We decline the examination of this question, because by demurring to the evidence, the defendant admitted its competency, and referred to the court the question of its legal sufficiency to establish the fact it was offered to prove. If, as now contended, it was not competent evidence, there was then no evidence of notice to which the demurrer could apply, and yet it is clear that by the demurrer, the defendant demanded the judgment of the court upon the evidence.

The impossibility of permitting the defendant now to object to the competency of the evidence will be apparent when we consider that if the objection had been taken in the court below, other proof of the fact might have been offered. The objection can no more be taken in this proceeding, than it could have been after the verdict of a jury, and indeed by the demurrer the court is substituted for the jury.

Let the judgment of the court below be affirmed.

CLAY, J.—Not sitting.

HERNDON v. GARRISON.

1. H assigned a promissory note to G; under the assignment, and bearing even date therewith, H wrote as follows: "Also this note is not to be sued for three months, I will stand good for the payment of the same, waiving all demands and notices;" two months after the transfer, G brought an action against the maker, obtained a judgment in the regular course of proceeding, and caused a

fieri facias to be issued thereon, which was returned "no property found" and sued H: *Held*, 1. That H could not object that the suit was prematurely brought against the maker; especially as G might have delayed until the three months expired, caused an execution to be returned "no property found," and have sued H quite as soon. 2. If the objection was available, it should have been taken by plea in abatement.

2. *Semble;* where the defendant suffers a note to be read to the jury, without objecting to the correctness of its description in the declaration, but excepts to the legal sufficiency of the evidence, an appellate court should not revise the question of variance.

WRIT of Error to the Circuit Court of Benton.

The defendant in error declared against the plaintiff in *assumpsit*, as the endorser of a promissory note made by Joel D. Hicks, on the 29th June, 1839, for the payment of three hundred and fifteen dollars, one day after date. The cause was tried on the plea of *non assumpsit*, with leave to give special matter in evidence. On the trial, the plaintiff offered the note with its indorsements, which are as follows: "I assign the within to Caleb Garrison, for value received, January 4, 1840,—E. Herndon. Also, this note is not to be sued for three months, I will stand good for the payment of the same, waiving all demands and notices. January 4th 1839. E. Herndon."

The defendant offered the record of a suit by the plaintiff, against the maker of the note, commenced on the 4th of March, 1840, which shewed the recovery of a judgment, and the return "no property found," previous to the institution of the present action. Thereupon he moved the court to instruct the jury, that under the proof they must find for the defendant, which instruction was refused, and he thereupon excepted. The jury returned a verdict for the plaintiff, and a judgment has been rendered thereon.

S. F. RICE, for the plaintiff in error.

No counsel appeared for the defendant.

COLLIER, C. J.—It is argued by the plaintiff in error, that both the indorsements on the note are to be considered as simultaneously made, and constituting in themselves an entire contract. That by the acceptance of the note under the condition annexed to the transfer, the indorsee impliedly stipulated that the maker

should not be sued within three months; and the breach of that contract, on his part, is a legal bar to his recovery against the indorser.

It is true, that the terms of the indorsements, and their date, would authorise the conclusion, that they were made at the same time, and when the defendant was about assigning his interest in the note to the plaintiff. But they do not establish such a contract as makes a forfeiture of the right of recovery against the indorser, the consequence of suing the maker within three months. The agreement that suit was not to be brought in that time, was intended either to relieve the indorsee from suing to the first court after he received the paper, or as an indulgence to the maker, so that he might pay without legal coercion. It cannot be regarded as a condition, the strict observance of which is necessary, in order to continue the liability of the indorser. Whether it was competent for the maker of the note to have pleaded in abatement of the action against him, that it was prematurely brought, we will not determine; but that suit being at an end, the indorser cannot set up as a defence that it was brought too soon. He has *prima facie*, sustained no injury by such a course on the part of the indorsee, and cannot insist upon the breach of an independent stipulation, as furnishing a reason, why he should not be discharged from his engagement to answer for the makers default.

The suit was brought at the end of two, instead of three months, the judgment was obtained at the second term of the court, and an execution issued and returned "no property found" to the third. Now, suppose the indorsee had not sued until after the three months had expired, and then had brought his action to the county, instead of the circuit court, he would have obtained a judgment, but two or three months later, and his execution would have been in the sheriff's hands during one half the time, that it appears he had an execution. Had the sheriff thought proper, he might have returned the execution long before the return day. [Reese v. White, 2 Ala. Rep. 306,] and thus, whether the action was brought within, or after the expiration of the three months, a suit might have been commenced against the indorser quite as early. It is impossible, upon principle, to consider the terms of the indorsements as imposing an obligation upon the indorsee not to sue the maker within a definite time at the hazard of discharging the indorser. The most that can be objected by the indorser is,

that by the suit being prematurely brought against the maker, he is subjected to an action too soon. If this objection were well founded, and injury could result from it, so as to make it available as a defence, it should have been pleaded in abatement instead of being relied on as a bar.

In respect to the objection that the note and indorsements set out in the bill of exceptions vary from the description of them in the declaration, we would remark, that we have been unable to discover any very material variance; and if there was an important discrepancy it could not now be noticed. The evidence was received without objection to its admissibility, and the only question was, as to its legal sufficiency to authorise a recovery of the defendant under the circumstances. We think the circuit court properly refused to charge the jury as prayed by the defendant, and its judgment is consequently affirmed.

CLAY, J. not sitting.

THOMPSON v. ARMSTRONG, USE, &c.

1. A joint and several maker of a promissory note, who is not a party to the case, on trial, against another maker, is a competent witness.
2. The mere fact of his being a party to the note, independently of other testimony, goes to his credit—not to his competency.
3. A note made to be discounted in a Bank, though not discounted, but afterwards put in circulation, may be binding on the parties.
4. A court is not bound to charge a jury, unless there be evidence to which the charge may have relation, or on which it may be founded.
5. A promissory note, *prima facie*, carries on its face, evidence of a consideration.

ERROR to the Circuit Court of Butler.

This was an action of assumpsit, founded on a promissory note of the following tenor:

1000 Dolls.—Twelve months after date, we, Benjamin Fuller, James K. Thompson and George H. Patillo, jointly and severally promise to pay Andrew Armstrong, Esq. cashier, or bearer, one thousand dollars, for value received, negotiable and payable at the Branch of the Bank of the State of Alabama, at Mobile.

Credit—*Benjamin Fuller*, *James K. Thompson*, *George H. Patillo*. } Signed. BENJAMIN FULLER, JAMES K. THOMPSON, GEORGE H. PATILLO.

The suit was discontinued as to Fuller and Patillo, on whom the writ was not served, and the declaration filed against Armstrong only. The pleas were *non est factum*, and the general issue.

It appears, by a bill of exceptions, that, on the trial, the plaintiff, after proving, *prima facie*, the defendant's signature, introduced to the jury the note just described; and introduced no other proof whatever.

The defendant introduced evidence tending to shew, that said note had never been discounted at the Branch of the Bank of the State of Alabama at Mobile, and that the said Branch Bank had no interest in said note, and never had; and no claim to it, and had not authorized this suit. The defendant also proved that Armstrong was cashier of said Branch Bank, during the year 1837, and that said note was in the form of notes usually made for discount in said Branch Bank. There was no proof shewing how Sutlif got possession of said note. Upon this evidence, the defendant requested the court to charge the jury, that, if they believed said note was made for discount in said Bank, and was not discounted, that the plaintiff in this action could not recover for the use of Sutlif, unless said Armstrong or Sutlif had proved to their satisfaction, that said Armstrong or said Sutlif was a creditor of some of the makers of said note, or was otherwise a *bona fide* holder of said note for a valuable consideration—the court refused to give this charge, and the defendant excepted to the refusal.

And the court charged the jury, that the face of the note was *prima facie* evidence that the defendant owed the sum of money therein specified, and that unless the defendant had proved a fraud, in the circulation of said note, and also satisfied them, that Sutlif was connected in the fraud, they must find for the plaintiff—to which charge, exception was also taken.

The defendant also requested the court to charge the jury that

if they believed from the proof, that said note was obtained fraudulently from the defendant, or was put fraudulently in circulation against him, that Sutlif could not recover in this action, without showing by testimony, that he was a *bona fide* holder for a valuable consideration—which charge the court refused to give.

The defendant offered to prove by one of the makers of the note, George H. Patillo, that *no consideration* had passed to any of the makers of said note from Armstreng—that it was *without consideration*—and that the signature of said defendant was not genuine. The plaintiff, by attorney, objected to the introduction of said witness, on the ground, that he was a co-maker of said note; the court sustained the objection, and the defendant excepted.

It is now assigned for error,

1. That the court erred in excluding the evidence of Patillo, for the purpose, and in the mode shown by the bill of exceptions.

2. The court erred in refusing to give the charge, first requested, as shewn by the bill of exceptions.

3. The court erred in refusing to give the second charge requested.

4. The court erred in the charge given.

N. Cook, for the plaintiff in error.
Boling, *contra.*

CLAY, J.—The first assignment of error, brings into view the competency of George H. Patillo, one of the makers of the note sued on, to give evidence impeaching its consideration, and the genuineness of the defendant's signature. The same question, in a qualified form, came up in the case of Ross & wife v. Wells. [1 Stewart's Rep. 139.] That was an action on a promissory note, given by Mrs. Ross, while sole, and Wm. J. McCarroll, payable to Wells; the writ issued against Ross & wife, and McCarroll, jointly, but was not executed on McCarroll, and discontinued as to him. The defence relied on was *non assumpsit*, failure of consideration, and fraud. On the trial, the defendants below offered McCarroll as a witness to prove, that the consideration of the note was certain negroes sold to Mrs. Ross, warranted sound, but that one of them was unsound and of no value. The circuit court held the witness incompetent; excep-

tion was taken, and it was afterwards assigned for error in this court. But the judgment was affirmed—the court deciding that the circuit court was right in excluding the witness—and generally, "that one maker of a note cannot be introduced by another, to invalidate the instrument."

In a subsequent case, [Whatley and Gragg v. Johnson, 1 Stewart, 498,] the same question arose. The plaintiff offered Whatley as a witness to prove the execution of the instrument, sued on, by Gragg. Though objected to by the defendant, the court admitted the witness, and this opinion was assigned for error. The court held the witness incompetent; that the court below erred in admitting him; and on that ground reversed the judgment.

Both those cases, however, showed that the witness was interested in the event of the suit, in which he was called to testify. In the first case, McCarroll, the witness might have been held liable to contribute his portion of the amount recovered on the contract, which was joint, or his evidence might have lessened that amount. In the latter, the court expressly placed it on the ground of Whatley's interest, which indeed, is fully apparent from the facts of the case, as stated. In later cases, the doctrine has frequently been laid down, that "the mere fact, that the witness is a party to a negotiable paper, does not disqualify him. Such is the established law in this State." [Adams v. Moore, 9 Porter, 406; Griffin v. Harris, Id. 225; Davidson v. Love, 1 Ala. Rep. N. S. 133.]

In this case, the witness, Patillo, although appearing on the face of the note, as a maker, was not, when offered, a party to the suit; nor directly interested in its event. The objection went to his credit, not to his competency, and he should have been admitted. Therefore, in this opinion of the court, there is error.

2. The second assignment alleges that the court erred in refusing to give the instructions first asked by defendant's counsel—that if the jury believed said note was made for discount in said Bank, but was not discounted, the plaintiff could not recover, unless said Armstrong, or Sutlif had proved, that one or the other of them was a creditor of some of the makers of the note, or otherwise a *bona fide* holder of said note for a valuable consideration.

This court held, in the case of the Planters' and Merchants' Bank, for the use of Sayre, Converse & Co. v. Blair & Morroh,

that although a note may have been made with a view to have it discounted in a Bank, and may not have been discounted, but is afterwards put in circulation, that it is valid and binding on the parties.

This court has, also, held at a very early day, and has repeatedly recognized the decision since, that a promissory note itself is evidence of a consideration, although a want of consideration may have been pleaded. In the case of McMahan v. Crockett, [Minor's R. 362,] the action was debt, on a promissory note—the pleas *nil debit*, and want of consideration—the circuit court charged the jury, that unless the plaintiff introduced other evidence of consideration, the note alone having been introduced, they must find for the defendant. The jury did find for the defendant; the case came here on error; and this court held the charge of the circuit court erroneous, and reversed the judgment.

3. The third assignment is, that the court erred in refusing to give the charge secondly requested; that, if they believed from the proof that the note was obtained fraudulently from the defendant, or was fraudulently circulated against him, that Sutlif could not recover.

To entitle a party to a charge from the court, there must appear in the bill of exceptions some evidence, on which to predicate it, or some evidence to which it may have relation. The evidence before the jury has already been stated, and it has been seen, that this court has held, that, notwithstanding such facts as are set forth, the holder of such a note would be entitled to recover; it follows, necessarily, that there is no evidence to sustain a plea of fraud, if pleaded; which, however, is not the fact. It will not do to call on a jury, *even by plea*, to pass on such general allegations, as are here made the ground of exception. In the case of Giles v. Williams, use, &c. [3 Ala. Rep. N. S. 318,] it was held that a plea alleging that a bond was obtained by "fraud, covin, and misrepresentation," is clearly bad. The plea, in such a case, ought to specify, in what the fraud consists, otherwise, it would certainly amount to no notice to the party whose rights are to be affected.

4. The last assignment is, that the court erred in the charge given; that the face of the note was *prima facie* evidence that the defendant owed the sum of money therein specified, and that unless the defendant had proved a fraud in the circulation of the

note, and that Sutlif was connected with the fraud, they must find for the plaintiff. This assignment is already sufficiently met, by the views presented on the other assignments. So far as there was evidence before the jury, the charge was correct.

Let the judgment be reversed, and the cause remanded.

MACKAY AND McDONALD v. DODGE & McKAY, SURVIVORS, &c.

1. A surety has the right to stand upon the precise terms of his contract, and any alteration made, without his consent, either in the terms of the original agreement or mode of performance, will exonerate him from liability.
2. When two parties agree to leave certain matters in dispute between them, to the award of certain persons, who are named, and subsequently a third person becomes surety for one of the parties, that he will perform the award which may be made against him on the submission; and afterwards, and without the consent of the surety, an agreement is made that other persons may be substituted in place of such of the arbitrators as fail to attend, and accordingly two others are substituted, but a majority of the original referees act, and make an award: held, that this was such an alteration of the original contract as absolved the surety from liability on the award so made.

ERROR to the Circuit Court of Barbour.

This was an action of covenant by the defendants against the plaintiffs in error, upon the following instrument:

"John Mackay as principal, and Hugh McDonald as security, bind themselves, and agree to give their promissory note, payable to Dodge, Kolb & McKay, twelve months from the date hereof, for whatever sum the arbitrators, chosen this day, by Dodge, Kolb & McKay and John Mackay, to settle and determine certain matters in controversy between them, may decree, which sum is to be added to the sum of two notes payable to Kolb & McKay, and the lawful interest on the same, which two said notes are now in suit in Charleston, S. C.; and also ac-

counts between Dodge, Kolb & McKay and John Mackay, which are in suit in Charleston, S. C., and the said Dodge, Kolb & McKay and Kolb and Mackay agree to stand to, abide by and perform whatever matter may be the award of said arbitrators. Given under our hands and seals, this 19th December, 1840.

John Mackay, (seal.)
Hugh McDonald, (seal.)
Dodge, Kolb & McKay, (seal.)
by David C. Kolb,
Kolb & McKay, (seal.)
by David C. Kolb."

The declaration consists of three counts, to which the defendants demurred separately, and were by the court overruled.

On the trial, as appears by a bill of exceptions, the plaintiffs proved, and read in evidence, the following instrument: "Know all men by these presents, that David K. Dodge, David C. Kolb and Angus McKay, merchants and partners in trade under the firm of Dodge, Kolb & McKay of the city of Apalachicola, Florida, and John Mackay, merchant of the town of Irwinton, have agreed to submit a certain demand made by the said Dodge, Kolb and McKay against the said John Mackay, which is hereunto annexed, and a certain demand made by the said John Mackay against the said Dodge, Kolb & McKay, which is also hereunto annexed, to the determination of John Hart and Joshua H. Dansforth, chosen by Dodge, Kolb & McKay, and Seldon S. Walkley and LaFayette Stowe, chosen by the said John Mackay, the report of whom, or the major part of whom, being made as soon as may be to any court of record of said county, (if the amount awarded against either should exceed fifty dollars,) if not to any justice of the peace of said county, judgment thereon to be final. And if either of the parties shall neglect to apppear before the referees after the proper notice given of the time and place appointed by the referees for hearing the parties, they shall have power to proceed *exparte*.

Dodge, Kolb & McKay, (seal.)
by D. C. Kolb.
John Mackay, (seal.)

Also the following agreement: "It is hereby agreed by and between John Gill Shorter, attorney for Kolb & McKay and

Dodge, Kolb & McKay, of Apalachicola, Florida, and Francis S. Jackson, attorney for John Mackay, of Irwinton, Alabama, that in case the arbitrators, or either of them chosen by the said parties aforesaid, to settle certain matters in dispute as set forth in a certain agreement, dated 19th December, 1840, should refuse, or fail to attend upon said abitrators, that then the said party or parties may forthwith choose another arbitrator or arbitrators, who shall proceed to arbitrate the matters in dispute according to said agreement aforesaid, and that the award of the arbitrators so chosen, shall be as good and binding as though it had been made by the arbitrators first chosen. And it is hereby agreed further, that the testimony of John N. Cummings, taken and signed and sworn to, before a justice of the peace at Apalachicola, Florida, shall be read to prove the debts against John Mackay in account rendered as cash, 1st June, 1838. and also up to June 1st, 1839, and it is further agreed that the said Mackay shall have time to send for the letter of Dodge, Kolb & McKay, and the account in their favor, both of which are now in the hands of his attorney in Charleston, S. Carolina, provided he obtains them within nine days from this date, 6th January, 1841.

JOHN MACKAY,
By F. S. JACKSON,
J. G. SHORTER,
Atto. for Kolb & Mackay and
Dodge, Kolb & McKay.

The plaintiff proved that this paper was executed by Jackson as attorney for John Mackay, but that he was not the attorney of McDonald, and that Mackay assented thereto. The plaintiffs also read an award in the following terms:

We, the arbitrators, having examined the accounts of John Mackay against Dodge, Kolb & McKay, and the accounts of Kolb & McKay, and Dodge, Kolb & McKay against John Mackay, find said John Mackay indebted to Dodge, Kolb & McKay, and Kolb & McKay in the sum of four hundred and two dollars fifty-nine cents, upon the 1st February, 1841.

JOHN HART, (seal.)
L. N. BROUGHTON, (seal.)
L. F. STOWE, (seal.)
V. R. TOMMEY, (seal.)
J. H. DANSFORTH, (seal.)

To the reading of all which to the jury, as evidence, the defendant, by his counsel objected, but the court overruled the objection, and the defendant excepted.

The jury found a verdict for the plaintiff for two thousand two hundred and ninety-seven dollars ninety-nine cents, for which the court rendered judgment.

The defendant assigns for error.

1. The overruling the demurrer to the several counts of the declaration.

2. The matter of the bill of exceptions.

MEEK, for plaintiff in error. The declaration is clearly bad; as the covenant between the parties was altered in a material part, the action should have been on the subsequent parol contract. [McVoy v. Wheeler, 6 Porter; 201.]

The change made in the agreement to arbitrate without the consent of McDonald, the surety, is not binding on him, and the award of persons by whose decision he had agreed to be bound, creates no liability on him.

SHORTER and BUFORD, *contra.*

ORMOND, J.—The objection to the declaration cannot prevail. This cause was here at the last June term, brought by the present defendants in error against the present plaintiff in error, when it was held that the declaration was sufficient, and whatever may be its merits or demerits, it cannot now be enquired into, as the previous decision, affirming its sufficiency, is the law of this case.

The question upon the bill of exceptions is, whether McDonald, the surety, is bound by the award made by the abitrators selected pursuant to the parol agreement entered into by the attornies of the parties.

A surety has the right to stand upon the precise terms of his contract, and any alteration made without his consent, either in the terms of the original agreement, or in the mode of performing it, will exonerate him from liability.

Here the surety was bound that Mackay should perform an award made by certain persons agreed on in an arbitration bond which had been executed previously on the same day, between

the defendants in error and Mackay, his principal; and as the principal would not have been bound by an award made by persons not agreed on in the submission, without his consent to such change, neither is the surety. His obligation was to secure the performance of an award made by certain designated referees; the effect of the alteration made without his consent is to make him liable for an award made by persons, only a part of whom were those originally selected. It is not important that a majority of those who made the award, were the same persons agreed on. It is impossible to know but that one of the substituted referees may have influenced the judgment of the rest. It is not, however, necessary that it should appear that the surety has been injured necessarily by the alteration, nor would it make any difference if it was evident that he was to be benefitted by it. It is a sufficient answer that it is not the contract for the performance of which he was surety.

The case of Whicher v. Hall, [5 B. & C. 269,] affords a strong illustration of the tenacity with which this principle is adhered to. The facts were, that the defendant was surety for another to the plaintiff for the milking of thirty cows, at seven pounds ten shillings each per annum; subsequently an agreement was entered into without the consent of the surety, that the hirer was to have twenty-eight cows for one half the year, and thirty-two for the residue. The court held that this was a new bargain, which was not binding on the surety, who had a right to insist on a literal performance of the original contract. That there might be but little difference between the two contracts, but that the true question was, whether the contract sought to be enforced against the surety, was the one for the performance of which he was bound.

This case may have been pushed to the verge of propriety; but it places in a strong point of view the inflexibility of purpose with which the rule, that no change shall be made in the terms or mode of performance of a contract, without the consent of the surety, is adhered to by the courts.

The award made in this case not being such as the surety, was bound by the terms of his contract for the performance of, no action can be maintained upon it against him, and it therefore becomes unnecessary to consider the other questions made at the bar.

Let the judgment be reversed, and the cause remanded.

ABBOT'S EX'R v. DOE, EX DEM. KENNEDY.

1. Under an act of Congress, passed in 1818, the United States caused certain lots in the city of Mobile, lying upon the shore of the bay, to be sold; in 1832, Congress passed an act, confirming a Spanish concession, made in 1806, for the shore by which these lots were bounded, which statute declares that "the patent provided to be issued, shall not be held to interfere with any part of said tract, which may have been disposed of by the United States, previous to the passage of this act; and this act shall be held to be no more than a relinquishment of whatever title the United States may now have to such tract of land:" *Held*, that the concession and confirmatory act, did not divest or impair the riparian rights of the purchasers under the act of 1818.

WRIT of Error to the Circuit Court of Mobile.

This was an action of ejectment brought by the defendant in error for the recovery of a "certain lot of ground" situate in the city of Mobile. The defendent below was admitted to defend as the landlord of the tenants in possession, and confessing lease, entry and ouster, the cause was tried on the plea of *not guilty*. At the trial the defendant excepted to the ruling of the court. The plaintiff to make out his title, offered in evidence a record from the Land Office at St. Stephens, of the claim of McBoy, also a deed from McBoy to Joshua Kennedy conveying his interest in the claim. He also read an act of Congress, passed in 1832, in favor of Joshua Kennedy—a patent certificate and survey, and a patent issued thereon in 1836, which embraces the *locus in quo*. *Further*, he offered a certified copy of Dinsmore's survey of the Fort Charlotte lots by the United States. All of which documentary evidence is made part of the bill of exceptions.

The defendant to support his title, offered in evidence patents issued under the authority of the act of Congress of 1818, bearing date 1st October, 1821. These patents describe lots lying immediately west of the *locus in quo*, being for lots numbered 8, 9 and 10, in square number 3, each of which had a front of thirty feet, and embraced part of the ground on which Fort Charlotte once stood. He also offered a copy of Dinsmore's map, and prov-

ed by the copyist, that it was scrupulously exact and drawn from the original; that the river boundary was marked on the copy as it was on the original, and was correct in point of fact. He called many witnesses, who testified that at the time of the sale of the Fort Charlotte lots high water extended over the eastern limits of the lots conveyed by the defendant's patents: *and further*, that the land now in controversy was reclaimed from the water and filled up by the defendant's testator, or those under whom he mediately, or immediately claimed. The defendant deduced a title to himself to the lots described by the patents, and proved that the property in controversy was adjoining them, and lay immediately east of them. The court charged the jury, that if they believed the evidence, the plaintiff's title was the best. To which the defendant's counsel excepted.

The concession to McBoy, bears date in 1806. The act of Congress of 1832, is merely a confirmation of the claim which McBoy transferred to Kennedy, and a relinquishment of the interest of the United States in the premises, subject to the just claim of any person "derived from the United States, or under either the British, French, or Spanish Governments."

The jury returned a verdict in favor of the plaintiff, and judgment was thereupon rendered. To revise which, is the object of the present writ of error.

DARGAN, for the plaintiff in error.
STEWART, for the defendant.

COLLIER, C. J.—The act of Congress of 1818, authorised the President of the United States, whenever, in his opinion, it was consistent with the public interest, to cause the ground whereon Fort Charlotte at Mobile stood, to be surveyed, and laid off into lots, with suitable streets, &c.; and when thus surveyed to sell the lots at public sale. The defendant, in right of his testator, deduced a title to several of these lots, under the purchasers at the government sale, and claims the premises in question as a riparian proprietor. That the property sought to be recovered was below high water mark at the time the Fort Charlotte lots were sold, is not disputed: and the quesions are. 1. What right did those under whom the defendant's testator claimed, acquire to the shore in virtue of their purchases of the contiguous land? 2. Did the

concession to McBoy, the act of Congress of 1832, and the patent issued thereunder, invest the plaintiff with a paramount title?

The grantee of land from the government lying along navigable water acquires a right of soil to high-water mark. It is a well settled principle of the common law, that a person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. [New Orleans v. The United States, 10 Peters Rep. 717; Hagan & Campbell v. Cleaveland, 8 Porter's Rep. 9, and cases there cited.] *Angell*, in his treatise on Tide Waters, argues to prove that it is allowable to make embankments on, or reclaim the shore, and appropriate it to private purposes where the public are not incommoded. But admits that the common, which is founded on the civil law, recognizes the State as the legal proprietor of the shore, in trust for the public, and entitled to judge whether artificial improvements will be promotive of the common right of enjoyment; and consequently may abate an intrusion as a public nuisance, or a purpersture: [pages 125, 133, 143.] The inference from the law, as we have stated it, is, that accretions from natural causes become the soil of the riparian proprietor, that his limits extend, or diminish, according as the water may recede or trench upon his land. The State only claims a property in the shore, as the representative of the public, for purposes entirely conservative of the usufruct therein, and never destructive of it. This being the case, it would seem necessarily to follow, that the sovereign power can make no disposition of the shore, by grant, or otherwise, prejudicial to the rights of those for whom it is holden in trust. This question was considered quite at length in the The Mayor, &c. of Mobile v. Eslava, [9 Porter's Rep. 577,] in which it was held, that although it was competent for the King of Spain, in the exercise of his unlimited powers, to grant the shore of the navigable waters in his American possessions, yet Congress was prevented, by the stipulations with Alabama, from exercising such a power, since its admission into the Union.

At the time of the sale of the Fort Charlotts lots, the concession to McBoy was wholly inoperative, and would not have authorised a recovery in an action of ejectment. [De La Croix v. Chamberlain, 12 Wheat. Rep. 599.] In fact, being subeequent in date to the treaty of St. Ildefonso, and not embraced by the stipulations

of the treaty of February, 1819, it was null and void, according to repeated decisions of the Supreme Court of the United States; [Foster & Elam v. Neilson, 2 Peters Rep. 254; Garcia v. Lee, 12 Peters Rep. 511; Keene v. Whitaker, et al. 14 Peters Rep. 170. See also Innerarity v. Byrne, 8 Porter's Rep. 176; Pollard's heirs v. Kibbe, 9 Porter's Rep. 712; Doe, *ex dem.*; Pollard's heirs v. Files, 3 Ala. Rep. N. S. 47; U. States v. Percheman, 7 Peters Rep. 51.] There can be no question, that the concession adduced by the plaintiff as a link in the title sought to be established, might be recognised by the United States; yet, it is conceived that no confirmation made subsequent to the sale of the Fort Charlotte lots would overreach and divest the riparian rights which the purchasers of them acquired. By granting the land to the shore, the government impliedly stipulated with the purchaser, that the shore should be his boundary, subject only to such changes as might be made by the encroachment or recession of the water. The act of 1832 is merely confirmatory of the claim acquired from McBoy, and declares, "that the confirmation of this claim, and the patent provided to be issued shall not be held to interfere with any part of said tract, which may have been disposed of by the United States previous to the passage of this act, and this act shall be held to be no more than a relinquishment of whatever title the United States may now have to such tract of land." This statute is set out *in extenso* in the patent, and the conveyance is made with a reservation of the paramount title of adverse claimants. This being the case, no question can arise as to the conclusiveness of the patent in a court of law; and the inquiry is, whether the purchasers of the Fort Charlotte lots, in virtue of a riparian proprietorship, became entitled to the premises in controversy. From what we have already said, it results, that no subsequent grant by the government can operate to divest the defendant's right to alluvion, or change his boundary by interposing another proprietor of the soil between his land and the water. The terms of the act cited, forbid the idea that such an interference was contemplated.

The conclusions we have stated appear to us to be so fully supported by authority, that we have not thought it necessary to sustain them by an extended argument. Foster and Elam v. Neilson, re-affirmed as it is by the cases cited from 12 and 14 Peters, is not at all shaken by the elaborate argument contained

in the separate opinion of Mr. Justice Baldwin, in Pollard's heirs v. Kibbe, [14 Peters.] The view there taken, indicates the most laborious research, but in our judgment is exceedingly ill-timed. It seems to us with all deference, that it would have been quite as well if the learned Judge had contented himself with dissenting in Garcia v. Lee. The judgment in that case gave to the American interpretation of the treaty of 1819, a judicial sanction, irreversible, save only by the other departments of the government. Whether the construction of Spain was not the true one, or whether it was not demanded by that integrity which should characterize negotiations between independent nations, is an inquiry which the judiciary could not now entertain without an inexcusable disregard of the maxim *stare decisis*. A departure from the course of decision as now established is also forbidden by the consideration that it would probably unsettle titles to an incalculable extent; while many would be deprived of their rights by the operation of the statute of limitations.

The result is, that the judgment of the circuit court is reversed, and the cause remanded.

CHAPMAN v. CHUNN, ET AL.

1. When upon a sale of land, upon future payment of the consideration, the vendor gives his bond for title when the purchase money is fully paid, he retains a lien, in the nature of a mortgage, upon the premises sold.
2. In such case, if the purchase money be not paid, chancery may decree a sale of the property, and apply the proceeds to its satisfaction.
3. A bill filed by the vendor, under such circumstances, need not disclose the nature of the vendor's title.
4. This lien is not impaired by the circumstance of the vendor's contracting, at the time of sale, to take, or actually taking, personal security for the payment of the purchase money.
5. That one has been placed in possession of land by the vendee, under such a sale, retaining the same, and claiming and refusing to pay over rents and profits, are sufficient grounds for making him a party to a bill filed to subject the land to payment of the consideration.
6. What constitutes multifariousness in a bill?

Error to the Chancery Court at Huntsville.

A bill was filed in the Chancery court, at Huntsville, by Reuben Chapman against Launcelot Chunn and James Linn, which charged that complainant, in November, 1839, sold to the defendant, Chunn, certain lands lying in Morgan county, for eighteen hundred dollars, payable at future periods, in three instalments, for which complainant took Chunn's notes. and gave his bond for title, to be conveyed after full payment of the purchase money. It was further agreed that Chunn should give good personal security, who should sign said several notes, but he failed and refused to comply with this part of the agreement. It is further charged that Chunn took possession of the lands, but has made payment of no part of the consideration, and has absconded with all his property, leaving his family and the said James Linn in possession; that Linn takes the profits, estimated at the annual value of $400, and although requested so to do, refuses payment of any part to complainant, notwithstanding he has offered to credit Chunn's notes with the amount of such payment. The bill further charges that lands have so fallen in value, that the tract sold is not now worth the purchase money; and seeks to recover rents, as well as to have the lands sold, and the proceeds applied to the satisfaction of said notes.

The subpœna was executed on defendant Linn, but returned "not found" as to Chunn, and the record shows no further proceedings against him.

Linn filed his answer, stating, in substance, that he knows nothing of the agreement between complainant and Chunn; that he found Chunn in possession, and made a contract with him, to the effect, that Chunn should furnish the land, and a certain number of hands, and that Linn should furnish certain other hands; that they should work in conjunction, and divide the crop equally. Linn denies that he has any other interest in the land, or that he intends holding possession of the same longer than may be necessary to gather his crop; and prays that his answer may be given the force of a demurrer to the bill.

No further step seems to have been taken toward preparation of the cause for final hearing; and at May term, 1842, on argument of said demurrer of defendant Linn, it was ordered by the

court, that the bill be dismissed generally, at complainant's costs.

It is now assigned for error, that the court below erred:

1. In sustaining the demurrer; and
2. In dismissing the bill.

S. Parsons, for plaintiff.

Robinson, for defendant.

CLAY, J.—The leading principle, involved in this case, has been well examined, and well settled, by the opinion of the court, in the case of Haley, et al. v. Bennett, reported in 5 Porter, 452, 473. In that case Bennett filed a bill against Haley & Browder, stating that the complainant had, some time before, sold a lot in Tuscumbia, with its improvements, to said Browder, for the consideration of five hundred dollars, part paid in cash, and the balance payable in several instalments, and had given his bond for the conveyance of title on full payment of the purchase money; that Browder had afterwards contracted to sell, as far as he was able, to Haley, &c.; on the coming in of Haley's answer, he appended thereto a copy of the complainant's bond, agreeing substantially with the allegations of his bill; but assigned first to one Norris, and afterwards to defendant Haley. On final hearing of the case, the circuit court, then exercising chancery jurisdiction, decreed a sale of the house and lot, the proceeds to be applied to the satisfaction of the balance of the purchase money, remaining due from Browder to Bennett, and the surplus, if any, to be paid to defendant Haley; and if the proceeds of the sale were insufficient to satisfy the balance due, the deficiency to be levied of the goods and chattels of Browder. From this decree a writ of error was prosecuted to this court, by which it was determined, amongst other things, that "all the essential incidents of a mortgage, particularly in regard to a lien upon the premises for the purchase money, attach to, and control a contract for the sale of lands, where the vendor makes a bond, conditioned for title, when payment is complete." The court further held, in substance, that "the vendor of real estate, who parts with the possession, and executes a bond, conditioned for the making of titles, when the purchase money is paid—has a lien upon the estate, which he may enforce in chancery, against the estate itself, in the possession of the assignee of the vendee," and this without first pro-

ceeding against the vendee, for the recovery of the purchase money.

The principles thus laid down seem to apply, with great force to the case under consideration, and must decide its fate, unless some of the objections urged by the counsel of defendant Linn should prevail.

1. The first of those objections is, that the bill does not shew that complainant had title to the land: that he avers a willingness to make a deed, but does not aver an *ability*.

In reply to this objection, it may be asked, what right has the defendant Chunn, or any one holding under him, to raise the objection? If the complainant is to be viewed as a mortgagee, having a lien on the premises for the sum due, as we have seen he is, he has an undoubted right to sell the subject of lien, whether of little, or great value, for what it may bring, till his claim is satisfied. It may be the complainant's misfortune, if the title to the mortgaged property is so doubtful, or bad, as not to produce an amount sufficient to pay his debt; but it certainly does not belong to the mortgagor, or person standing in a similar relation, to raise the objection. But the bill does not seem to be liable to the objection stated, if either of the defendants were in a situation to make it; for the complainant avers he "is *ready* and willing to comply with his agreement, so soon as payment shall be made." His agreement was to convey title to the premises; and it is difficult to conceive, how a party can be *ready* to convey title, when he has none.

2. Again it is contended, that the agreement between the complainant and defendant Chunn, never was perfected—so that no such interest ever vested in Chunn, as would authorize this proceeding.

We have seen that complainant gave his bond to Chunn for title, which, so far as appears, is yet in his possession, and Chunn signed the several notes, but failed to procure any one to sign as his security. This was an additional security, promised by Chunn to complainant—the failure was the first breach of his contract; and it cannot be admitted that he shall take advantage of his own wrong, retain the complainant's bond, and, at the same time, defeat his claim to the purchase money.

3. It is further alleged, that complainant did not rely upon his lien, but waived it, by requiring security. Yet, the bill shows,

that, so far from waiving his lien, the complainant did not execute a deed, but only gave his bond for title, when full payment of the consideration should be made. By the agreement, Chunn was to have given security to his notes, besides leaving the title in complainant till full payment was made. The case of Foster against The Trustees of the Athenæum, [3 Ala. Rep. N. S. 302,] cited by the defendant's counsel, does not sustain the objection. In that case an actual conveyance of title had been made, and other, and independent securities taken; and after reviewing the authorities on the subject, the court comes to the conclusion, "that the law on this interesting subject ought to be considered as settled, at least in the United States; that when a vendor of land executes a conveyance, and takes personal collateral security, binding others as well as the vendee, as a note with security; or a collateral security, as a pledge or mortgage, that no lien exists on the land itself." Now, in the case before us, as we have seen, instead of conveying title, the complainant only gave a bond to make a title, on the condition, that full payment of the consideration was made. Hence, there is no analogy between the cases. And, we presume, it will not be seriously contended, that a vendor may not convey title, and take a mortgage on the same property, or give a bond for conveyance when the consideration is fully paid, which, as we have seen, has "all the equitable incidents of a mortgage," and, at the same time, take personal, or any other *additional* security for the payment of the purchase money.

4. Another objection, relied on by defendant Linn's counsel is, that there is a misjoinder of parties; that the bill does not show that Linn holds any estate, or even interest, under Chunn; nor any priority of estate or contract between them.

We do not think this objection sustained by the record. It is true the bill does not say in express words that a *contract* of any particular kind, was made between them; nor specify any particular *interest*, or *estate*, as having been passed from Chunn to Linn; but it expressly charges that, when Chunn left the country, he put Linn in possession of the land, and that Linn was then, and from the preceding winter had been, using the same, taking the profits thereof, and had declared his intention to continue to do so, without making to the complainant any payment, or remuneration whatever. The conclusion would result from these facts, that there was a contract of some nature between the par-

ties, by virtue of which Chunn transferred the possession and use of the land to Linn, under which the latter claimed the exclusive use and profits. Being in possession, under Chunn, and refusing to account to Chapman for rents, or profits, certainly raised the presumption that he claimed an interest in the property, and he was therefore properly, and necessarily made a party.

5. The last objection, relied on, is that the bill is multifarious—that if complainant has any right to rents and profits against Linn, it is not by force of his contract with Chunn—that regarding Chunn as a mortgagor and complainant as a mortgagee, he would have no right to rents and profits.

To constitute multifariousness, a bill must set forth several distinct matters, perfectly unconnected. If it merely seek to recover the value of land, and rents and profits issuing out of the same property, there certainly is not such entire want of connection, as to render it multifarious, even admitting that one may be rightfully recovered, and the other not. In the case under consideration, the complainant seeks to recover a certain amount due to him, by virtue of a lien held by him on certain lands; and alleging that the lands will not produce a sufficient sum for the satisfaction of the claim, he asks the court to supply the deficiency by giving rents and profits, which have issued out of the same land, during the existence of his lien. Now both claims are predicated upon the same land, belong to the same subject matter, and are supposed, by the complainant, to result from the same contract, made with him by one of the parties, under whom the other holds. Suppose he is mistaken, and claims too much, this should not be permitted to defeat his recovery of what he may rightfully claim. In the case of Kennedy's heirs and executors v. Kennedy's heirs, [2 Ala. Rep. N. S. 571] this court held the following language:

"The objection of multifariousness, it is said, must be confined to cases, where the case of each defendant is entirely distinct and separate *in its subject matter* from that of the other defendants; for the case against one defendant may be so entire, as to be incapable of being prosecuted in several suits; and some other defendant may be a necessary party to some portion only of the case stated. In the latter case, multifariousness would not be an available objection." [Story's Eq. Pl. 2d ed. 225; Attorney General v. Craddock, 3d Milne & Craig's Rep. 85.]

In continuation, in the same case, the court held it "difficult, if not impracticable, to reconcile all the decisions on this subject, or to educe from them general rules to test the objection. Without attempting to cite them, it may be said with truth, they are extremely various; the courts seeming to be influenced by what was convenient and just, in the particular case, rather than lay down any inflexible rule; always discouraging the objection, where, instead of advancing, it would defeat the ends of justice."

In the case before us, the complainant found Linn in possession of land, on which, by contract with Chunn, he held a lien for a certain sum of money—that possession, too, was obtained directly from Chunn: possession, *prima facie*, raises a presumption of claim and interest in property: Linn not only held the possession, and used the land, but refused to account to complainant for rents and profits. He appeared to have an interest, if not a claim, to the property, which the complainant sought to subject to the payment of his debt; and he was, therefore, properly made a party. Nor, if it should turn out on the final examination of the merits, that the complainant is not entitled to recover of Linn, does it follow necessarily, that the bill is multifarious, and that he cannot recover against Chunn.

The result of these views is, that the decree of the court below must be reversed, and the cause remanded for further proceedings.

BINGHAM v. RUSHING.

1. The act of 31st December, 1841, the more speedily to collect debts against corporations, does not have a restropective effect so as to authorise a suit commenced before its passage.
2. When the stockholder of a corporation is garnisheed as a debtor of the company, and answers that he has paid all the calls made by the President and Directors of the company upon him, he cannot be made responsible upon the residue of his stock, upon which no calls have been made, upon the general law of garnishment.

ERROR to the Circuit Court of Tuskaloosa.

This proceeding was commenced in the court below by the plaintiff in error, by procees of garnishment against the defendant in error. The plaintiff, at the March term, 1840, of the circuit court of Tuskaloosa, recovered a judgment against the Wetumpka and Coosa Rail Road Company, for $1365 06, and on the 31st August, 1840, he made affidavit and obtained process of garnishment against the defendent as a stockholder of the Company. The defendant appeared and answered, denying that he was indebted to the Company, but admitted that he was a member; that he had subscribed for thirty shares of the stock, at one hundred dollars, per share; that he paid twenty-five per cent. on his subscription, which was all that was called for by the Company, and denied also that he was liable, because the subscription was made upon an agreement with the company, the conditions of which have not been performed.

The plaintiff filed an affidavit and tendered an issue under the statute, to which the defendant demurred, and the court sustained the demurrer. The plaintiff then moved for judgment upon the answer of the garnishee, which the court refushed. The plaintiff prosecutes this writ, and assigns these matters as error.

COCHRAN, for the plaintiff in error, cited 2 S. & P. 199; 3 ib. 21.

PECK and MOODY, *contra*. No judgment can be rendered against the garnishee on his answer under the general law, because he denies owing any thing; nor under the act of 1841, authorising the stockholders of a corporation to be garnisheed, because the act was passed after this proceeding was commenced.

ORMOND, J.—Several questions are presented on the record and have been made in the argument of counsel, which from the view we take of this case, it is not necessary to consider. We shall confine ourselves to the examination of two; whether this garnishment can be sustained under the act of 1841, and whether any judgment can be rendered upon the answer of the garnishee under the law as it existed previous to the passage of that act.

The act of the 31st December, 1841, was passed to secure more speedily the collection of debts against corporations. The first section authorizes a garnishment to issue against any stockholder in a corporation, in favor of a judgment creditor, upon his making an affidavit which the statute prescribes. The second section declares that the stockholders shall be liable to the creditors of the company for the amount of stock subscribed by them and unpaid, as debtors to the corporation, and that such liability may be enforced by garnishment.

It is not necessary to consider what was the extent of the remedy intended to be conferred by this statute; whatever it was, it must be prospective in its character, so far as it relates to the institution of the suits authorised by it, and cannot apply to suits then in existence. If this garnishment was not authorised by law, when it was instituted, it cannot be aided by this act; and in the consideration of the question, the act must be left entirely out of view.

By the law, as it stood when this proceeding was commenced, upon the return of the proper officer, to an execution of "no property found," upon the plaintiff or some credible person making affidavit that the defendant had no property in his possession, and that another person was indebted to him or had effects belonging to him in his hands, a garnishment issued against the person supposed to be indebted to the defendant in execution. [Aik. Dig. 213.] It was then, being indebted to the defendant in execution, or having possession of effects belonging to him, which subjected one to the process of garnishment, and the only question is whether the defendant was a debtor of the corporation, or had effects of the corporation in his hands.

By his answer, he states that he was a subscriber for three hundred shares of stock of the company, at one hundred dollars per share—that the directors have called on the subscribers for twenty-five per cent. on each share, which he has paid, and that no other call has been made by the company. He states further, that he subscribed as a stockholder, conditionally, upon an agreement entered into between the company and himself, which he alleges the company have not complied with. Without entering on the consideration of the question, whether he could become a stockholder in the company, in any other mode than that pointed out in the charter, and for the purposes of this case, con-

sidering him a general stockholder, we proceed to enquire whether the answer shows any indebtedness on the part of the garnishee to the company, which could be condemned to the payment of their debt to the plaintiff in error.

The charter of the company, which was created by the Legislature on the 9th January, 1836, and amended on the 21st December, 1833, must be our guide in ascertaining when, and in what mode the stockholders became liable to the company for the amount of their subscription. The 2d section of the amended charter declares "that the directors shall have power to require the stockholders of said company to pay such instalments on their respective shares of stock in said company, and at such times as they may think best;" and upon the refusal, or neglect to pay such instalment, pursuant to such call by the President and Directors, that such stock may be sold, &c.

The 2d section gives the company a remedy by motion against such defaulting stock-holder, either for the amount called for by the company, or for any deficiency of such amount not produced by a sale of the stock, and requires the court to render judgment therefor. It is therefore perfectly obvious that until such call was made, there was no such indebtedness on the part of the stockholder as would authorize the corporation to maintain an action against him, either at common law or by the summary remedy given by the statute—and if the corporation could not maintain the action because there was no indebtedness, it is clear this proceeding cannot be maintained.

These views dispose of the entire case, and render it unnecessary to enquire whether the court decided correctly on the demurrer to the issue tendered by the plaintiff, because if every fact he desired to controvert were found in his favor, it could not change the result. The question, whether by the act of 1841, referred to at the commencement of this opinion, it was not intended by the Legislature to dispense with the necessity of a call by the President and Directors on the stock-holders and to make them liable for the amount of their subscription to the creditors of the company without such requisition, is one of great importance; but as already stated, as that act was not in existence when this proceeding was commenced, it can have no influence on this case.

Let the judgment be affirmed.

TILLOTSON v. DOE, EX DEM. KENNEDY.

1. The possession of a tenant becomes adverse to his landlord, when he disclaims to hold under him, and the statute of limitations begins to run against the landlord, from the time he has notice of the disclaimer.
2. The confirmation by the United States of a concession of lands made by the Spanish authorities, will not prevent one who claims adversely from availing himself of the statute of limitations, by proof of possession, during the time the government of Spain exercised dominion over the country in which the land is situated; although the statute did not complete a bar until after the concession was confirmed.
3. Although a patent certificate may be evidence of legal title, *quere*, will not a patent issued to a third person by the direction of him who holds the certificate invest the patentee with the paramount legal title.
4. Where one person makes a quit-claim deed to another, and afterwards obtains a patent for the same land, it seems that the title of the patentee does not inure to the person to whom he has quit-claimed, as it would if he had conveyed with a warranty of title.

WRIT of Error to the Circuit Court of Mobile.

This was an action of ejectment brought by the defendant in error for the recovery of the possession of certain real estate in the city of Mobile. The defendant below, upon the receipt of the usual notice from the casual ejector, entered into the rule confessing lease, entry and ouster as to a part of the premises, and as to the same insisted upon the superiority of his title. In respect to the residue, he disclaimed all pretensions either to the title or possession.

It is shown by a bill of exceptions, sealed at the instance of the defendant, that the plaintiff, through several mesne conveyances sought to deduce a title from Henry Baudin, who claimed under a Spanish concession, bearing date the 28th July, 1798. The evidence adduced by the plaintiff, was as follows: 1. The concession to Baudin. 2. A quit-claim from Baudin to William E. Kennedy, acknowledged the 14th May, 1814. 3. A quit-claim deed from Wm. E. K. to the plaintiff's lessor, dated 20th March, 1818. 4. A deed of release and assignment, dated 4th February, 1813, from the plaintiff's lessor to William Pollard, written on the

back of a Spanish concession of the same premises to the lessor: but objection being made, the concession was only read for the purpose of shewing, that the land described in the deed of assignment embraced the premises in controversy. 5. The will of William Pollard, admitted to probate in January, 1818, which authorised his executor to sell his real estate; also a deed from the executors of Pollard to the plaintiff's lessor. 6. A lease from Pollard to Plumley, dated 14th May, 1814, to commence from July, 1813, and determine in 1818. All this documentary evidence related to, and embraced the premises in question, together with other lands. 7. He read to the jury from the American state papers, relating to the public lands, certain proceedings which shewed that the land described in the concession to Baudin had been confirmed to Baudin, Pollard and Joshua K, severally, at different times. 8. He also adduced a patent certificate to the lessor for the same premises, with a request written by him at the foot thereof, that a patent might issue to Baudin, which was issued accordingly on the 31st March, 1837. 9. Proof was offered tending to shew, that Wm. E. K. was in possession of the premises in 1813, having built a small house thereon in 1805; and that he stated in 1806 he intended to claim it by pre-emption: further, that Plumley was in possession under Pollard.

The defendant on his part, adduced the following proof. 1. A deed from Plumley to Sarah Shæffer, for the premises in question, dated the fourth of March, 1815. 2. H. V. Chamberlain testified, that in February, 1814, he came to Mobile, and found George Shæffer, the husband of Sarah S, in possession of the lot in controversy, and claiming it as his own: that Plumley publicly disavowed the title of Pollard, and was selling off in lots the property embraced in the lease of the latter to him; this was known to Pollard and Kennedy at the time, "for there was a constant contention between them as to the right to the property." That Shæffer occupied the lot sued for as his own, until his death, and his widow and children lived on it afterwards. Mrs. Shæffer intermarried with Frazier, who made application for confirmation, and it appeared from the State papers, that the lot was confirmed to her for 40 feet depth, with a front of 72 feet. It was further shown that Frazier and his wife were dead. Mrs. F. leaving two infant children, one by each of her marriages; that the lot occupied by their mother was divided between them; that

William Raser purchased the part of one of the children, being the premises in question, and Joshua K., about the year 1830, took forcible possession of the part allotted to the other child, in the absence of his guardian, and has retained it ever since. 3. It was shown that Raser was dead; that the premises were sold by the guardian of his infant child, under a decree of the Orphans' court of Tuskaloosa county, and that the defendant became the purchaser, received a deed of conveyance, and entered upon and took possession thereof.

Upon this evidence, the defendant moved the court to charge the jury, that if they believed, that Plumley entered upon the premises described in the lease from Pollard to himself, and afterwards publicly disavowed the title of his lessor, and went on to sell out the premises in lots, as his own property, that this was known to Pollard, and no rent was paid to him, and that the purchasers under Plumley entered with the knowledge of Pollard, then, the statute of limitations would commence running against him and those claiming under him "from the time of such disavowal of his title by Plumley and sale to another." *Further*, if they believed that Shæffer thus entered, that the statute of limitations would begin to run against Pollard from the time Shæffer took possession of the lot; and if more than twenty years had elapsed previous to the commencement of the present action, the plaintiff could not recover. This charge was refused. But the court charged the jury, that the statute did not commence running until the expiration of the lease, and that it was optional with Pollard, whether he would sue or not before that time.

The defendant also prayed the court to charge the jury, that the patent to Baudin, under the proof did not inure to Kennedy, or give him a right of entry, but the title, if any was conveyed thereby, and vested in Baudin, *or his heirs*—it being shown that Baudin had died previous to the time it issued. This charge was refused; and the court charged that the patent (under the proof,) innured to the benefit of J. Kennedy, and was but the confirmation of his title. To all which the defendant excepted.

A verdict was returned for the plaintiff that he was entitled to recover the premises sued for, and that the value of the improvements made by the defendant thereon, were ten thousand and fifty three 50-100 dollars, and judgment was rendered according to the verdict in favor of the respective parties against each other.

To revise this judgment, the defendant alone has prosecuted a writ of error, and assigned for error the questions of law presented by the bill of exceptions, &c. With the assent of the plaintiff in error, the defendant has assigned for error the rendition of the judgment against him for damages, if it be competent for the court to consider it.

DARGAN, for the plaintiff in error.
STEWART, for the defendant.

COLLIER, C. J.—The first question which invites our consideration, is, whether the possession of a tenant becomes adverse to his landlord by disclaiming to hold under him, and denying that he has a title to the premises, and if it does, will the statute of limitations begin to run against the landlord, from the time he has notice of the disclaimer? It has been so often held, as to be now regarded as settled law, that if the tenant set his landlord at defiance and disavow his right to demand rent of him, or his title to the property, he places himself in a position antagonistic to his landlord, who may bring an ejectment against him without first giving a notice to quit. [Adams on Ejectment, 118; Jackson v. Wheeler, 6 Johns. Rep. 272; Jackson v. Thomas, 16, Johns. Rep. 293; 2 Bla. Com. 275; 5 Dane's Ab. 718; Bull. N. P. 96. So it has been frequently stated as a principle, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or another, during the existence of the tenancy. The doctrine of estoppel applies to the relation between landlord and tenant, and as by the acceptance of the lease the latter impliedly admits, that the former has a disposable interest in the premises, which is to continue until the expiration of the tenancy at least, he shall not be allowed to set up an adverse title in a third person, so as to prevent the landlord from recovering either rent, or possession. [Blight's lessee v. Rochester, 7 Wheat. Rep. 535.] "He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time, or demand of possession." [Willison v. Watkins, 3 Peters' Rep. 48.] But the principle of estoppel say the court, in the case last cited, has nev-

er been so far extended as to maintain that a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time, that the act of limitations has run out, does not operate to bar an ejectment at the suit of the landlord. "No injury can be done the landlord, unless by his own laches. If he sues within the period of the act of limitations he must recover; if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and loss of time. As to the assertion of his claim, the possession is as adverse and as open to his action, as one acquired originally by wrong, and we cannot assent to the proposition that the possession shall assume such character as one party alone may choose to give it. The act is conclusive on the tenant. He cannot make his disclaimer, and adverse claim, so as to protect himself during the unexpired term of the lease; he is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right." Again, say the court, "if a different rule was established, the consequences would be very serious. A mortgagee, a direct purchaser, from a tenant, or one who buys his right at a sheriff's sale, assumes his relations to the landlord with all their legal consequences, and they are as much estopped from denying the tenancy. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled, before we could give our sanction to such a doctrine." The court then entered upon an examination of the authorities, and attained the conclusion that these are in harmony with the views they had expressed.

Hovenden v. Annesley, [2 Sch. & L. Rep. 607,] is also a leading case on this point. Lord Chancellor Redesdale there says, "that attornment will not affect the title of his lessor, so long as he has a right to consider the person holding the possession as his tenant. But as he has a right to punish the act of the tenant in disavowing the tenure, by proceeding to eject him, notwithstanding his lease; if he will not proceed for the forfeiture, he has no right to affect the rights of third persons, on the ground that the possession was betrayed; and there must be a limitation to that as to every other demand. The intention of the statute of limitations being to quiet the title of lands, it would be curious if a tenant for ninety-nine years, attorning to a person insisting he

was entitled, and disavowing tenure to the knowledge of his former landlord, should protect the title of his original lessor, for the term of ninety-nine years. That would, I think, be too strong to hold on the ground of the possession being in the lessee, after the tenure has been disavowed, to the knowledge of the lessor;" p. 624. [See also Ogden v. Walker's heirs, 6 Dana's Rep. 425; Hendrick v. Robinson's adm'r, et al. 7 Id. 165; Jackson v. Johnson, 5 Cow. Rep. 74; Lane v. Osment, 9 Yerger's Rep. 86; Ross v. Blair, 1 Meigs' Rep. 525; Peyton, et al. v. Stith, 5 Peters' Rep. 491; McMaster's v. Bell, 2 Penn. Rep. 180; Clapp v. Bromagham, 9 Cow. Rep. 573.] This view harmonizes with the analogies of the law, which permit persons holding property under a claim of title to insist upon the statute of limitations, as a bar to a recovery, or as giving a title, where it has commenced and run, after the possession has become adverse. Thus, if a trustee denies the right of his *cestui que trust*, and the possession of the property becomes *adverse*, lapse of time from that period may constitute a bar even in equity. [Kane v. Bloodgood, 7 Ch. Rep. 90.] So it has been held, that possession by the mortgagee for the length of time after forfeiture of the mortgage, that bars an action at law, is available against the mortgagor both at law and in equity, unless interest has been paid in the meantime, or there appear some other circumstance excusing the neglect. [Humphries v. Terrell, 1 Ala. Rep. 650, and cases there cited; Hughes v. Edwards, 9 Wheat. Rep. 490; Elmendorf v. Taylor, 10 Wheat. Rep. 152.] We might add to these, other analogous cases if it were necessary, but the cases which have been cited directly to the point, are so well sustained by argument, so numerous, and consonant to reason, that we do not feel at liberty, even if inclined to disregard them. The rule they establish cannot work a serious injury to the landlord, as the recognition of an opposite principle, would be likely to superinduce, in respect to third persons. Nor can it, in any manner change the nature of the contract, and permit the tenant to dispute the title of his landlord, during the period of the tenancy, before the statute has completed a bar.

It has been heretofore decided by this court, that the confirmation by the United of a *concession* of lands under the Spanish authorities, will not so operate, as to prevent a person from availing himself of the statute of limitations, by proof of possession, du-

ring the time the government of Spain exercised dominion over the country in which the land was situated; and this, although the statute did not complete the bar until after the concession was confirmed. [Innerarity v. The heirs of Mims, 1 Ala. Rep. 660; The heirs of Mims v. Huggins, Id. 676.]

From this view of the law, it is obvious that the circuit court erred, in supposing that the statute of limitations did not begin to run from the time of Plumley's disclaimer of Pollard's title, and a knowledge thereof by the latter, and not until the expiration of his lease. Our conclusion upon this point renders it unnecessary for us to consider the second question. We will, however, remark, that although the patent certificate might be sufficient evidence of a legal title in the lessor of the plaintiff, yet it is worthy of examination, whether the issuance of the patent to Baudin by his direction, did not invest the patentee with the legal title. The solution of this question would involve the consideration of several important points, which we are not now inclined to enter upon. If the lessor of the plaintiff was a purchaser of Baudin, under a deed, with a *general warranty*, then the legal title, if it vested in him by the patent, would inure to the former; but it would seem upon authority, that no such consequence follows, where the grantor has executed a quit-claim deed, or one which warrants the title against himself and his assignees only. [Comstock, et al. v. Smith, 13 Pick. Rep. 116; Allen v. Sayward, 5 Greenl. Rep. 227; Kennedy & Moreland v. Heirs of McCartney, 4 Porter's Rep. 158.]

This view of the case is so decisive of it, that we will not notice any other question sought to be raised, but merely declare as a consequence of our opinion, that the judgment is reversed and the cause remanded.

CLAY, J. not sitting.

BETTS, GARNISHEE v. BROWN, USE, &c.

1. Joinder in issue, between plaintiff in execution and garnishee, is a waiver of previous irregularity.

ERROR to the Circuit Court of Barbour.

This was a proceeding in garnishment, in the circuit court of Barbour county, by the defendant in error, against the plaintiff in error. The affidavit of the attorney of the defendant in error states, substantially, that the Intendant and Town Council of Irwinton, against whom the said Samuel N. Brown, for the use of said Samuel Harrison, had recovered a judgment, had no property within the knowledge of said affiant, in his possession, and that affiant had just reason to believe that said Betts, and other persons, whose names are mentioned, were indebted to the defendants. Thereupon a summons of garnishment issued against the several persons, alleged to be so indebted—which was returned executed upon all the persons named therein, except one Stowe. Afterwards, at September term, 1841, a judgment was entered by default, against said Betts, without any condition, but subsequently, a *sciri facias* issued against him, calling on him to be and appear at the circuit court, to be holden for said county of Barbour, on the third Monday of March ensuing, to show cause why said judgment should not be rendered absolute against him. The *sci. fa.* was made known to him, and on the 23d of March, 1842 said Betts appeared and filed his answer, setting forth a list of notes, &c. in his hands, belonging to said corporation, amounting to something more than two hundred dollars. The truth of this answer was contested in due form—issue taken thereon, between the plaintiffs in execution, and said garnishee, and submitted to a jury, who found the issue for the plaintiff; and found the sum of $781 20-100 due the said plaintiff from the defendant in execution, upon the judgment in said garnishment mentioned, and further found the indebtedness of said garnishee, liable to said garnishment to equal the said sum of $781 20-100 and judgment was, thereupon, rendered by the court in favor of the plaintiff in exe-

cution, against said garnishee for that amount, and the costs of the garnishment.

After the verdict in said cause, the garnishee's counsel moved to discharge him, on the ground that the plaintiff had shewn no judgment in his favor against the town council of Irwinton—whereupon the plaintiff produced from the records of said court a judgment for the same amount mentioned in the summons of garnishment in favor of the plaintiff against "The Intendant and council of the town of Irwinton—alias the Intendant and council of the town of Larkinsville—alias the town of Irwinton." To which the defendant excepted, &c. without shewing on what precise ground.

The plaintiff in error now assigns the following errors:

1. The court erred in rendering judgment final against the garnishee (Betts) at the first term, to which the garnishment was returnable.

2. In holding Betts to answer a *scire facias* issued on a final judgment.

3. In holding Betts to answer a *sci. fa.* issued without an order of court.

4. In overruling Betts' demurrer.

5. In rendering judgment on the verdict of the jury.

6. In rendering two judgments final in the same cause.

7. In the matter of the bill of exceptions.

J. Cochran, for plaintiff in error.

J. Buford, *contra.*

CLAY, J.—It has been ruled by this court, on more than one occasion, that a joinder in issue, between the parties, upon the truth of the answer of garnishee, is a waiver of any previous irregularity. [Hazard, adm'r v. Franklin, garnishee, 2 Ala. Rep. N. S. 349.] Therefore, as the court remarked in the case just cited, we decline any examination of the proceedings, anterior to the issue—unless it be to remark, in reference to the fourth assignment of errors, that the demurrer to the statement, contesting the truth of the garnishee's answer, was placed expressly on the ground that "it was no affidavit;" that the record shews that "oath having been made, that the answer of the said garnishee, Betts, filed at this term of the court is incorrect, it is ordered, that the

parties, (plaintiff and said garnishee,) take issue upon said answer, and thereupon, said plaintiff comes and files his statement, controverting said answer," &c. The plain inference from this entry is, either that the contesting statement was sworn to when made, or, more probably, that the court gave leave to amend it by making oath to its truth. If the court did give leave, so to amend the contesting statement, it was a matter within its own sound discretion, and not assignable for error. This view of the case disposed of the first four assignments of error, as they were all anterior to joining of issue between the parties.

The 5th assignment—that the court erred in rendering judgment on the verdict of the jury, is not sustainable, because the verdict was fully responsive to the issue, joined between the parties. It not only appears by the record, that the jury found the issue for the plaintiff, generally, but also that they found the sum of $781 20-100 due the said plaintiff from the defendant in execution, upon the judgment in the said garnishment mentioned; and they further found the indebtedness of said garnishee, liable to said garnishment, to equal the sum of $781 20-100; whereupon the court rendered judgment for the plaintiff.

The 6th assignment is, that the court rendered two judgments final in the same cause. This refers to the final judgment rendered at the return term of the garnishment, which was an irregularity preceding the issue, and thereby waived.

The 7th assignment is, that the court erred in the matter of the bill of exceptions.

The bill of exceptions shows that after the verdict was rendered, the garnishee's counsel moved the court to discharge him, as the plaintiff had shown no judgment in his favor, against the town council of Irwinton, and the plaintiff produced from the records of the said circuit court, as proof to sustain a judgment on the verdict in the present issue, a judgment in the name of "Samuel N. Brown, for the use of Samuel Harrison v. The Intendant and Council of the town of Irwinton, alias the Intendant and Council of the town of Larkinsville, alias the town of Irwinton," to which the defendant excepted.

We are of opinion this objection came too late, after the trial of the issue, and finding of the jury. If the exception could have been taken at all, it should have been done at a previous stage of the proceedings. But, if it had been so taken, it would not have

been a sufficient objection to the admission of the judgment as evidence. It would not have been regarded a material variance, that the corporate authorities of Irwinton, were sometimes known as the Intendent and Council of Larkinsville, alias Irwinton. We do not think there was error in the admission of the judgment described in the bill of exceptions—therefore,

Let the judgment of the court below be affirmed.

F. R. & G. BAKER v. BLACKBURN.

1. Where in an action of trespass *quare clausum fregit*, the plaintiffs, to show their right to maintain the action in their joint names, introduced a deed by which one conveyed to the other, an interest in the land on which the trespass was committed, and offered to prove its execution by proof of the genuineness of the signatures.—*Held*, that as the defendant was neither a party or privy to the deed, it was necessary to prove that the deed was executed when it bore date, or at least that it existed at the time of the commission of the alleged trespass.

ERROR to the Circuit Court of Tuskaloosa.

This was an action of trespass *quare clausum fregit*, by the plaintiffs in error, against the defendant. Upon the trial, the plaintiffs, to show their right to maintain the action in their joint names, offered in evidence, the copy of a deed (having laid a satisfactory ground for the introduction of the secondary evidence) which bore date previous to the commencement of the suit, and purported to be executed by the plaintiffs, and proved by a witness, that he received the original from one of the plaintiffs, some days after the commencement of the suit. That the original was in the hand-writing of the plaintiffs, and that he had heard them acknowledge they had executed it. The deed purported to convey an interest in the *locus in quo* from one of the plaintiffs to the other. The court refused to permit the copy to be read, on the ground that there was no sufficient proof of the execution

of the original. To which the plaintiff excepted, and which is the error assigned.

Cochran, for plaintiff in error, cited, 1 Stewart 245, Norris Peake, 147, 154; 1 Phil. Ev. 476; Littell's Sel. Cas. 459.

Peck & Clark, *contra*.

ORMOND, J.—It is certainly the general rule, that where a deed is offered in evidence, to which there is no subscribing witness, proof of the hand-writing of the obligor will authorise the jury to infer its due execution. This rule must, however, in its application, be confined to those cases where the deed is offered in evidence against the maker. In this case, the deed offered in evidence, purported to convey an interest in the land from one of the plaintiffs to the other, and was the evidence of their right to maintain the action in their joint names, to which deed the defendant was neither party nor privy. This was in effect an attempt to prove a fact by the declaration of the party in whose favor it was offered. The declarations or admissions of a party, are evidence against himself, but cannot be evidence against another, who was not privy to them.

Cases doubtless exist in which the declarations of a person against his interest have been held evidence against another. Thus in the case of Bliss v. Winston, [1 Ala. Rep. N. S. 344,] it was held, that the declaration of a tenant in possession could be given in evidence after his death, to show under whom he held the possession; but the allowance of such testimony depends on principles altogether different from those which must govern this case. The objection to the testimony in this case is, that it was not shown when the deed was made, and to hold that the proof of the signature established the date of the deed, would be to permit the party to make testimony for himself. To make it competent evidence against the defendant, it should have been shown that it was made when it bore date, or at least, that it existed at the time of the commission of the alleged trespass.

The case cited from Littell, merely shows that the probate and registration of a deed establishes the date of its execution. This is a decision upon the statute of Kentucky, authorising the registration of deeds, and can have no application to the question here

presented. In the case of Bradford and Dawson v. Campbell [2 Ala. 203,] we held that the registration of a deed under the act of 1828, did not dispense with proof of its execution when offered in evidence.

There is no error in the judgment, and it is therefore affirmed.

ECHOLS v. EXUM.

1. Where an attorney at law acknowledges in writing, that he has received a promissory note for collection, the rule of law which forbids that verbal evidence shall not be admitted to contradict a writing, will not prevent a creditor of the holder of the note, from proving by the attorney, that he was directed to pay it to him when collected.

WRIT of Error to the Circuit Court of Madison.

The defendant in error declared against the plaintiff, in assumpsit, for money had and received to his use; and the cause was tried on the *general issue*. On the trial, the defendant excepted to the ruling of the court. From his bill of exceptions it appears, that the plaintiff proved, that the defendant, as administrator of James C. Wayland, deceased, received of the sheriff of Madison, the money collected on an execution in his favor as administrator against Finley Jones, surviving partner, &c.; that a few days after the receipt of the money by the defendant, John J. Coleman, as the agent of the plaintiff, demanded the same of him. Coleman further testified that Wayland was indebted to the plaintiff in an amount about equal to the sum received by the defendant, and placed the note upon which the judgment was recovered against Jones, in his (witness') hands, to be held by him as a collateral security for the debt due to the plaintiff, and directed the money, when collected, to be applied to the payment of the plaintiff's demand.

The defendant then proved and read to the jury, a receipt given by Coleman at the time the note was placed in his hands as follows:

"Received, Huntsville, Ala. 5th April, 1841, of James C. Wayland for collection, a promissory note made by Pruitt & Jones, dated 12th May, 1838, due 1st October, 1838, with interest from 1st May, 1838, for the payment to O. D. Sledge or order, of two hundred and twenty dollars and forty-one cents—said note is assigned by O. D. Sledge, John Halsey and Benjamin Tiller.

JOHN J. COLEMAN, Attorney."

And thereupon asked the court to exclude from the jury all the testimony of Coleman, going to show that he received the note as collateral security for the debt due the plaintiff by Wayland, and that the proceeds were to be applied to its payment, but the court overruled the motion, and permitted the evidence to go to the jury, and the defendant excepted. A verdict was returned for the plaintiff, and a judgment has been thereon rendered.

ROBINSON, for the plaintiff in error.

S. PARSONS, for the defendant in error.

COLLIER, C. J.—The only question raised in this case, is, whether, the evidence of the witness, Coleman is inadmissible, as tending to contradict, add to, or explain his receipt. It is conceded, that a mere receipt is not a writing of a character so conclusive, as to exclude parol evidence to show to what extent it should operate; but it is insisted that the paper adduced as evidence, is not only a receipt, but its legal effect is a promise to collect the note made by Pruitt & Jones, if collectable, and pay over the money to Wayland.

It is certainly true, as argued for the plaintiff in error, that parol evidence is "inadmissible for the purpose of altering the *legal operation* of the instrument by evidence of an intention to that effect, which is not expressed in the instrument." [Paysant v. Ware, Barringer, et al. 1 Ala. Rep. 165.] But did the evidence objected to, have that effect. The solution of this question must depend upon the interpretation of the writing, which is supposed to be conclusive. By that paper, Coleman acknowledges that Wayland had placed in his hands, the note for collection, but does not express any thing more. The law, from this omission, implies a promise that he will use legal diligence in endeavoring to collect it, and when he receives the money will pay it to Wayland or order, on demand. There is nothing in this contract

which would inhibit Wayland from ordering, either by writing, or verbally, simultaenously with the delivery of the note to Coleman, that the amount when collected, should be paid to the plaintiff, or any one else. And the introduction of evidence, showing such to have been the fact, is not in opposition to Coleman's contract, but perfectly consistent with it. There is nothing in the receipt or inferrable from it, which prohibits Coleman from paying the money to the plaintiff; and even if it expressed *in totidem verbis*, that the money should be paid to Wayland, the plaintiff could not be deprived of it, if by contract he was entitled to it.

In no point of view in which this case can be considered, is the evidence obnoxious to the objection made to it. It is impossible, that the rights of the plaintiff could be prejudiced by the writing to which he was no party, the more especially as it does not undertake to confer rights upon a third person who is now setting up an adverse claim.

The consequence is, that the judgment must be affirmed.

CLAY, J.—Not sitting.

MURPHY'S ADM'RS, v. THE BRANCH OF THE BANK OF THE STATE OF ALABAMA, AT MOBILE.

1. The right of the Branch Bank at Mobile, to recover judgment on thirty days notice, is a summary proceeding, authorised by the statute, creating the institution; and the provisions of the statute must be strictly pursued.
2. That remedy is only given against the *maker*, or *endorser* of a note, bill, or band; and is not authorised against the *representatives* of a deceased maker or endorser.
3. The administrators of a joint maker of a note, &c. cannot be sued jointly with the surviving makers.

ERROR to the Circuit Court of Mobile.

In this case, it appears, a note had been given by John Murphy, deceased, D. R. W. McRae, Francis B. Carter, W. R. Hamilton, and W. Henderson, to B. Gayle, cashier, or bearer, for the payment of $14,136 46-100, for value received, twelve months after date, payable and negotiable at the Branch Bank at Mobile. When the note fell due, default having been made in payment, these proceedings were commenced by a joint notice, directed to Duncan W. Murphy and Robert N. Murphy, administrators of John Murphy, deceased, and to the other makers jointly; and at the spring term, 1842, of Mobile Circuit Court, a judgment, pursuant to said notice, was rendered, on motion, jointly, against all said defendants, for the full amount of said note, with costs—execution to issue, and be levied of the goods and chattels, rights and credits of John Murphy, deceased, in the hands of the said administrators, yet to be administered, as well as of the goods and chattles, lands and tenements of the other defendants in their own right.

To reverse this judgment, the writ of error is prosecuted, and it is now assigned for error:

1. The judgment shews no title in the Bank, to the note sued on; it not appearing that the payee had endorsed it over.

2. There is a joint judgment by default against the administrators of the intestate, and against the securities of the said intestate individually.

3. The court below erred in rendering judgment against D. W. Murphy and Robert N. Murphy, as administrators of John Murphy, deceased, on motion.

4. There is a misjoinder of defendants, in the notice, and judgment, in this, viz: the notice is directed jointly to the administrators of the said John Murphy, deceased, and the securities of the intestate to the note, and the judgment is by default, jointly, against them all, &c.

Pearson & Peck, for the plaintiffs in error.

Porter, *contra.*

CLAY, J.—1. This is a summary proceeding, given by statute, and unknown to the common law: consequently, to sustain the judgment, it must appear that the statute has been strictly pursued. This doctrine has not only been recognized in the case

of McWalker v. The Branch of the Bank of the State of Alabama at Mobile, [3 Ala. Rep. N. S. 153,] but in all other cases, decided by this court, where the question was properly presented. It will only be necessary, therefore, to look into so much of the statute, establishing the Branch Bank at Mobile, as gives this summary remedy against its debtors. It is in these words:

"§ 7. If any person or persons shall be indebted to said Branch Bank, as *maker* or *endorser* of any note, bill, or bond, expressly made payable and negotiable at said Branch Bank, and shall delay payment thereof, it shall be lawful for the President of the Branch Bank, after having given thirty days' notice thereof, to move the circuit court of the county of Mobile, on producing to said court, before which the motion is made, the certificate of the President of the Branch Bank, that the debt is really and *bona fide* the property of said Branch Bank, for judgment, &c."

John Murphy, the intestate, was one of the *makers* of the note, which is the foundation of this summary proceeding; Duncan W. Murphy and Robert N. Murphy have been appointed his administrators, since his death, and are liable in that capacity, alone—it is not pretended that they were either *makers* or *endorsers* of the note. Would it be consistent with the rule laid down, to subject them to a judgment, on thirty days' notice, and motion? As the remedy is only *expressly* given against the *makers* and *endorsers*, and not extended in terms to the *representatives* of those, who may die before payment, it cannot be properly used against those who are only liable in that capacity.

This principle was fully recognized in the case of Dumes vs. McLosky, decided at the January term, 1843. That was a summary proceeding, by way of distress for rent, in the city of Mobile, under the act of 1834. In that case the court confined the remedy to the tenant individually, and stated—"This is a summary remedy, and according to all our decisions upon this class of cases, cannot be extended, by construction, beyond its terms."

The case of Logan, adm'r v. Barclay, [3 Ala. Rep. N. S. 361] is one strongly in point. That was a proceeding against a constable, by motion, under the statute, for failing to make money upon an execution, when he could have done so, by the use of due diligence. The court held that, after the death of the constable, pending the motion, the suit could not be revived against his administrator, because the revival of the suit is not provided for by

the statute. Without pursuing the subject further, it is sufficient to repeat, that such has been the uniform current of the decisions, made here, whenever the question has been presented. Hence, the administrator of a deceased maker or endorser of a promissory note, bill, or bond, which is the property of the Branch Bank at Mobile, is not subject to a recovery, in this form of proceeding.

2. There was, also, a misjoinder of the parties. It is too well settled, to require argument, that, at common law, an administrator of one of several joint contracting parties, cannot be sued in the same action with the survivors. On the principles already stated, in this case, we do not think the act of February 3d, 1840, entitled "an act to change the manner of bringing suits on bills of exchange and negotiable paper," which has been referred to by the counsel for the defendant in error, will warrant a joint proceeding against the administrators of a deceased maker, or endorser, of a joint note or bill, and the surviving makers, or endorsers.

These points sufficiently dispose of the case, and it becomes unnecessary to notice the other assignment.

Let the judgment of the court below be reversed.

FOSTER v. GOREE.

1. A mere right of action in a chattel, cannot be sold so as to vest in the purchaser the right to sue for its recovery; but as the right to personal property draws to it the possession, if the possession of another is derived from, and held in subordination to that of the owner, as in the case of a bailment, he may sell, and his vendee will have the right to sue for its recovery, if the possession is improperly withheld.
2. A deed of trust being made and recorded, the maker of the deed, who, until default, was entitled to the possession of the property conveyed by the deed, sold it to McC. & C. who sold it to G.—*Held*, that the title of G being the title of the maker of the deed, was not adverse or hostile to that of the trustee.
3. A trustee must sell according to the terms of the deed; but if an irregular sale

is made, it may be waived by the maker of the deed and the *cestui que trust*; and in that event no one else can complaim.

4. Regularly, personal property should be present at a trust sale; but if the maker of the deed, or one holding under him, refuse to produce it on the day of sale, he cannot afterwards object that it is sold in its absence, if the *cestui que trust* waives his right to have it present at the sale.

ERROR to the Circuit Court of Tuskaloosa.

Trover, for the conversion of a slave, by the plaintiff against the defendant in error.

On the trial, it appeared in proof that two persons by the name of Miller & Addison, executed a trust deed, by which the slave in controversy and some others, were conveyed in trust, to secure the plaintiff and another person, against liability, in consequence of their being the sureties of Miller & Addison, to a debt due in the State Bank, payable by instalments, which deed was duly recorded.

The deed provided, that upon a failure to pay either of the instalments, the trustee should, at the request of the *cestui que trust*, take into possession and sell a sufficiency of the property to satisfy such default; and that the makers of the deed should retain possession of the property until default made. That when the first instalment of the debt fell due, the trustee took possession of some of the slaves from McCown & Conrow, who then had them in possession, but a satisfactory arrangement being made by them for its payment, the slaves were returned to them by the trustee.

When the second instalment fell due, the debt not being paid, the trustee advertised and sold all the slaves in the deed mentioned—the negro sued for, being one of them, who was purchased by the plaintiff at two hundred and fifty dollars, due notice having been given of the time and place of sale, according to the terms of the deed, but the slaves were not present at the sale.

The defendant proved that he purchased the slave now sued for, from McCown & Conrow, at the price of one thousand dollars, and received from them a bill of sale, with warranty. The defendant was present at the sale, and forbade it, claiming the slave as his property. It was further proved that Miller & Addison had sold the slaves to McCown & Conrow, and delivered them the possession, and that the plaintiff had been compelled

to pay upwards of eighteen hundred dollars upon the debt in bank, on which he was the surety of Miller & Addison.

Upon this testimony, the defendant's counsel insisted that the title and possession of the defendant in this case, was adverse to the title of the plaintiff; and the slave not being in the possession of the trustee at the time of the sale, the sale to the plaintiff was void, and he could not recover; and the court so charged the jury, and the plaintiff excepted.

The plaintiff then moved the court to charge the jury, that if they believed from the evidence, that the defendant held under McCown & Conrow, who held under Miller & Addison by a purchase from them subsequent to the date of the trust deed, that then the title of the defendant would not be adverse to that of the plaintiff; which charge the court refused to give, and the plaintiff excepted.

After the jury had retired, they returned and asked the court what was an adverse possession? and were informed by the court that if the negro was not present at the sale by the trustee, but was in the possession of the defendant, who at the sale forbade it, and set up his title, that then the title of the defendant was adverse, and the plaintiff could not recover; to which the plaintiff also excepted.

The assignments of error bring to view the charges of the court, and the refusal to charge, as set out in the bill of exceptions.

Peck and Porter, for the the plaintiff in error, insisted that the possession being derived from the maker of the deed, could not be adverse to that of the trustee; and assimilated this case to that of mortgagor and mortgagee. They distinguished this case from Goodwyn v. Loyd, [8 Porter, 237,] because in that case there was a claim under color of title. They also cited 2 Stewart, 144, as a case expressly in point, and referred to 5 Cow. 173; 7 ib. 323; 4 Kent's Com. 150 to 158.

Cochran and Huntington, *contra*, maintained that the title was held adverse, in as much as the defendant was a purchaser for valuable consideration, and held possession in hostility to the claim of the trustee; that the case in 8 Porter, 237, and that of Dunklin v. Wilkins, at the last term, were in point.

They also insisted that it was the duty of the trustee, to prevent a sacrifice, to reduce the property into possession before a sale; and that on principles of public policy, no trust sale could be supported when made in the absence of the property. They cited, 9 Dana, 372; 2 A. K. Marshall, 136; 8 Cow. 597.

ORMOND, J.—It can admit of no controversy, that the sale of a chattel by one out of possession, and to which he has the mere right of action, will not confer on the vendee such a title as will enable him to sue for its recovery in his own name. This is the point decided in Goodwyn v. Loyd, [8 Porter 237,] and rests upon the familiar principle, that a chose in action is not assignable at common law. It is equally as clear, that the *mere* fact that the actual possession is not in the vendor at the time of the sale, does not show that he may not transfer to the vendee, both the right of property, and the right to sue in his own name for its recovery, if the possession is improperly withheld. The right of the vendee, in such a case, to sue in his own name, will depend upon the fact, whether the person in possession of the property asserts a title to the property hostile to that of the vendor, or whether the title which he sets up is in subordination to, or derived from, the vendor.

If the former, then, although the possessor may have acquired the possession by a trespass or by contract,—as for example by a bailment, from the vendor, the title asserted by him being hostile to that of the vendor, could not be transferred by the latter, so as to vest the transferee with the right to sue in his own name; for in regard to personal property, there is no such rule as prevails in relation to real property; by which the tenant is forbidden to dispute the title of his landlord. But, if the latter, then, as the right to personal property draws to it the possession, if the possession was withheld after such sale, the vendee might maintain an action for its recovery in his own name. See Brown v. Lipscomb, [9 Porter 472,] where this doctrine is asserted and illustrated.

The question, then, on this part of the case is, what title did the defendant set up? Was it one adverse or hostile to that of the trustee? The title of the trustee was derived from the deed of Miller & Addison, vesting in him the legal title, and reserving to themselves only the right of possession, which right ceased, when default

was made in failing to pay the debt, to secure which the deed was made. The title of the defendant is derived from McCown & Conrow, who purchased from Miller & Addison, after the deed was made and recorded. It is therefore most apparent that the title set up by the defendant is, in fact, the mere title of Miller & Addison; it cannot therefore be adverse or hostile to that of the trustee, which is derived from the same source, but *prior* in point of time. In a word, the defendant is clothed with the title of Miller & Addison, and no other; and if they could not dispute the title of the trustee, neither can he. If it could be admitted that the maker of a deed of trust could, after the making of the deed, by a sale of the property, create a title hostile to that of the trustee, and thereby prevent a sale of the property according to the terms of the deed, and drive the trustee to his action to recover the possession, there is an end of this mode of securing the payment of debts. It does not require the prophet's ken to foretell, that after such a decision there would be but few sales under deeds of trust.

It results from this examination, that the title of the defendant was not adverse to that of the trustee; but being derived from, and held under the maker of the deed, was entirely consistent with the title of the trustee.

It was, however, strenuously urged, that on principles of public policy, sales by trustees, in the absence of the property, ought not to be tolerated.

The trustee derives his power to act from the deed, and is bound to conform to its provisions. In the language of the court, in Greenleaf v. Queen, [1 Peters, 138] where the deed required the trustee to sell at public auction, "This was the test of value which the grantor thought proper to require, and it was not competent to the trustee to establish any other, although by doing so, he might in reality promote the interest of those for whom he acted." Nor can it admit of controversy, that the power delegated to the trustee, is a special power, and that he cannot protect himself from liability, or vest a title to the property he sells, but by acting in strict conformity with it.

But these well established principles must be considered in connection with others equally clear. The limitations on the power of the trustee, are for the benefit of those interested in the trust—the maker of the deed and the *cestui que trust*; and it cannot be

doubted that they may waive the performance of conditions designed for their benefit; it is equally certain that neither party can object that a duty has not been performed, the performance of which has been prevented by his own act.

The deed does not, in express terms, require that the property should be present at the time of the sale, but such must be the legal inference, as otherwise the property could not be expected to bring its fair value. But if the maker of the deed, who, by its terms, was entitled to the possession until default of payment, voluntarily retains the possession, and refuses to produce the property on the day of sale, he cannot object that it is sold in its absence. To allow him to prevent the sale by voluntarily withholding the property, would be to permit him to take advantage of his own wrong, and by his own act to defeat the provisions of the deed. Doubtless, the *cestui que trust* might refuse to permit the sale to proceed in the absence of the property; but if he waives this right, no one else can object to it.

Thus in the case cited from 1 Peters, 138, the purchaser objected that the property had not been sold by the trustee in the manner prescribed in the deed; but the court replied, that as the maker of the deed, and the *cestui que trnst*, waived all objections to the regularity of the sale, no one else could complain.

In this case, the defendant who has succeeded, by his purchase of the trust property, to all the rights and liabilities of Miller & Addison, is precluded from objecting that the slave sued for was sold in his absence, and greatly below his value, because he voluntarily refused to produce him, and thus, by his own act, caused the result which he now complains of.

This point was thus ruled in the case of Echols v. Derrick, [2 Stewart, 144,] a case which, in all its material features, is precisely analagous to this.

Let the judgment be reversed, and the cause be remanded.

WAYLAND'S ADM'R v. MOSELY.

1. A bill of lading is a writing of a two-fold character—1, a receipt—2, a contract, to carry and deliver goods; as a receipt, it may be contradicted by parol evidence, but in other respects it is treated as other contracts. But where the shipper is impliedly bound from the face of the bill to pay the freight of goods, it is allowable to show that the owner of the boat received them under an agreement with a third person to pay the freight, if the latter has paid it.

WRIT of error to the Circuit Court of Madison.

The plaintiff in error declared against the defendant, in *assumpsit*, upon a parol contract; by which, the former agreed to carry from Whitesburg, in Madison county, to the city of New-Orleans, ninety-seven bales of cotton, weighing thirty-nine thousand one hundred and thirty-three pounds; and the latter, in consideration thereof, undertook to pay him seventy-five cents per hundred pounds, for all the cotton that was thus carried and delivered. The declaration avers the delivery of the cotton according to contract, and the non-payment of the freight.

The cause was tried on the plea of *non assumpsit*, with leave to give any special matter in evidence which would be good as a plea. On the trial, the defendant excepted to the ruling of the court. It is shown by the bill of lading that the defendant shipped the cotton by the plaintiff's intestate, as alleged, to "Messrs. Martin, Pleasants & Co. or their assigns, they paying half freight for the same at the rate of seventy-five cents per hundred pounds." The plaintiff also proved, that the cotton therein mentioned, was delivered in good condition to Martin, Pleasants & Co. in New-Orleans; and further, it was testified by P. Patteson, that defendant sent the cotton to him without any instructions what to do with it; that he, Patteson, made the contract with the plaintiffs' intestate for its shipment, put it on his boats, and took the bill of lading; that the next time witness saw defendant, he told him what had been done, and he did not object to it. The defendant then offered to prove by Patteson, that previous to the shipment of the defendant's cotton, he, witness, had sold a tract of land to the plaintiff's intestate, for which he was to pay him by freight-

ing cotton to New-Orleans; that the intestate agreed to take the cotton referred to in the bill of lading, and look to witness for the payment of the freight; further, the intestate never considered Mosely bound for it. After the cotton had been shipped, and bill of lading taken, Patteson purchased the cotton of the defendant, and bound himself to pay the freight, and still considers that he is bound for it. The plaintiff objected to the admissibility of the evidence offered by the defendant, but his objection was overruled, and the evidence allowed to go to the jury; and thereupon he excepted. The jury returned a verdict for the defendant, and a judgment has been thereupon rendered.

Robinson, for the plaintiff in error.—The bill of lading obliges the defendant to pay the freight, and the evidence of Patteson, stating that the freight was paid by him, under a contract with the intestate, from the purchase money due him by the latter, for a tract of land previously sold, was inadmissible; because it contradicted the bill of lading. [3 Stewart's Rep. 271; 5 Porter's Rep. 498; 3 Ala. Rep. N. S. 590; 9 Wheaton, 581; 3 Mason's Rep. 378; 2 Day's Rep. 137; 1 Caine's Rep. 358; 3 Conn. Rep. 9.]

Parsons, for the defendant in error, cited Greenleaf's Evidence, 353; 5 Gill & Johns. Rep. 156–7–8; 1 Paige's Rep. 13; Id. 202; Peters' Cond. Rep. 545; 3 Cranch's Rep. 311.

COLLIER, C. J.—In Jones, et al. v. Sims & Scott, [6 Porter's Rep. 138,] it was held, that if a contract be made by bill of lading in the ordinary form, by which one man acknowledges to have received of another, some article of merchandize to be delivered to a third, who is to pay the freight, the title, by the shipment, *eo instanti*, passes to the consignee. Some of the cases maintain, that the bill is conclusive of the right of property; but in the case cited, this Court considered it only *prima facie* evidence that the consignee was the owner, and might be rebutted by showing the reverse to be true. Whether the same presumption is indulged, where the bill of lading states the consignees are to pay half the freight, the view which we take of the present case, makes it unnecessary to inquire.

If the bill of lading could be regarded as a mere receipt, it

would be inconclusive, and might be varied by parol evidence; but its character is two-fold, viz: a receipt, and a contract, to carry and deliver. So far as it acknowledges the receipt of goods, and states their condition, &c., it may be contradicted; but in other respects it is treated like other written contracts, [Babcock v. May, et al., 4 Ohio Rep. 334; Barett, et al. v. Rogers, 7 Mass. Rep. 297; Greenl. on Ev. 353–4; 3 Phil. Ev. C. & H's notes, 1439.] The bill of lading contains no express stipulation on the part of the shipper to pay freight, and his liability, at most, is a legal deduction, from the fact of the shipment, and the failure to provide some other means of payment. Let it be conceded then, as it is the point of view most favorable to the plaintiff, that the defendant is under an implied agreement to pay the freight, and we think it may be shewn that the evidence was properly admitted. The facts, so far as material, are these; Patteson, the agent of the defendant agreed with the plaintiff's intestate to carry from Whitesburg, on the Tennessee river, the cotton in question; the intestate was at that time indebted to Patteson for a tract of land previously sold, and for which he was to pay him by carrying cotton to New-Orleans; and he agreed to look to Patteson for the freight, and never considered the defendant bound for it. After the bill of lading was signed, Patteson purchased the cotton of Mosely, bound himself to pay the freight, and still considers himself bound to pay it. The fair inference from this evidence is, that Patteson gave the plaintiff's intestate a credit equal to the amount of the freight against intestate's indebtedness to him, and that the freight, in virtue of the parol agreement, made simultaneously with the shipment of the cotton, was, in point of law, fully paid. This being the case, there is no objection to the admission of the evidence, as there might be if the contract to pay freight was executory, and had never been executed. In McNair and wife v. Cooper, at the last term, it was conceded, that in an action on a written contract, the defendant might avail himself in his defence of a parol stipulation which no longer remained *in fieri*, but had been performed. This case is well supported by authority, cited both in the argument of counsel, and in the opinion of the court—it is not opposed to any principle, and is so decisive of the case before us as to render it unnecessary to amplify. The judgment of the circuit court is affirmed.

CLAY, J. not sitting.

POPE & HAMNER v. HEADEN.

1. A party who sets up a title must furnish the evidence necessary to support it; and if the validity of a deed depends on an act *in pais*, the party claiming under it, is bound to prove the performance of that act.
2. To sustain the exercise of a naked power, not coupled with an interest, the law requires that every pre-requisite to the exercise of that power should precede it.
3. To sustain a sale of land for taxes, by the Marshal and Collector of Wetumpka, the party claiming under it, must show that every pre-requisite has been strictly performed.

ERROR to the Circuit Court of Autauga county.

POPE, for the plaintiff.
KENNEDY, for the defendant.

CLAY, J.—This was an action of trespass, brought by the plaintiffs against the defendant in the circuit court of Autauga county, to try the title to subdivision lot, number 35, of original lot 185, in the city of Wetumpka. To entitle them to a recovery, the plaintiffs in error, who were plaintiffs in the court below, relied on evidence of a title, as purchasers of the lot in question, at a sale of the same, made by the marshal and collector, for taxes due to the corporate authorities of the city of Wetumpka. The plaintiffs introduced evidence in the circuit court to shew that the lot sued for had been assessed, for a certain amount of tax, advertised and sold by the marshal and collector, and that they were the purchasers. To this evidence the defendant demurred; the circuit court sustained the demurrer—and it is now assigned for error, that the court erred in sustaining said demurrer, and giving judgment for the defendant.

To determine this question, it is only necessary to recur to one or two well settled principles, and apply them to the facts. To sustain the exercise of a naked power, not coupled with an interest, the law requires that every pre-requisite to its exercise should precede it. The party who sets up a title must furnish the evidence necessary to support it; and if the validity of a deed depends on an act *in pais*, the party claiming under it is bound to prove

the performance of that act. This doctrine is clearly laid down in the case of Williams, et al. v. Peyton's lessee, [4 Wheaton, 77.] In that case, the plaintiffs in error relied on a deed from the Marshal U. S. for the District of Kentucky, as purchasers, under a sale for taxes; and the court held, that "in the case of lands sold for the non-payment of taxes, the marshal's deed is not even *prima facie* evidence, that the pre-requisites required by law, have been complied with; but the party, claiming under it, must shew positively that they been complied with." Pursuant to this principle, the court held, that it was not sufficient to rely on the recital in the marshal's deed, as proof that legal notice of the time and place of sale had been given; but that it was the duty of the purchaser to preserve the newspapers, and prove that publications of notice had been duly made.

Without going into an examination of all the evidence relied on by the plaintiffs, in the court below, it will be sufficient to enquire, what notice of the time and place of sale is required by the ordinance of the city of Wetumpka, introduced and relied on, as part of the evidence. The 5th section of that ordinance contains the following proviso: "*Provided*, that when a tax is assessed upon property, the owners of which are not known, ninety days notice of the sale, specifying the property and the taxes, shall be given in some newspaper, printed in said city."

The record shews that *the owner of the lot*, sought to be recovered, *was not known*. The object of the proviso, just recited was to give full notice to the unknown proprietor of the lot, of its intended sale, and to furnish him every facility for the voluntary payment of the tax, that he might thereby prevent the sacrifice of his interest, which might otherwise ensue. It appears by the evidence, that an advertisement of the sale of the lot, dated on the 1st day of November, 1839, and then handed to the publisher, was published in the Wetumpka Courier, a newspaper published in the city of Wetumpka, weekly, from the 6th day of November, 1839, (which was the first day of publication) until the 29th day January, 1840, and the sale took place on the 3d day of February, 1840. Between the *date* of the advertisement and the day of sale, there were more than ninety days—but between the first day of its *publication*, and the day of sale there were but *eighty-nine*, excluding the first, and including the last day. The clause of the ordinance, we have seen, required "*ninty days* notice of the

sale." Did the date of the advertisement, and the act of handing it to the publisher of the newspaper, on the *first* of November, amount to notice? We think, clearly not. Those acts gave no better assurance, that the sale of the property would become known to the proprietor, than if the time of sale had remained in the mind of the collector. The terms of the ordinance admonished all owners of property in the city, subject to taxation, to look to the newspapers, therein published, for notice of any such intended sale, and not to the publisher. Then, the notice required by the ordinance not having been given, the sale was illegal and void, and the plaintiffs acquired no title under it: consequently, the circuit court was correct in sustaining the demurrer to the evidence.

Let the judgment of the court below be affirmed.

STURDEVANT v. GAINS.

1. A count which does not allege a trespass directly and positively by the defendant, but charges by way of recital, "that whereas, &c." and also alleges that the plaintiff was discharged from imprisonment, by the judge of the county court on *habeas corpus*, that the prosecution is ended and determined and that the imprisonment was without probable cause, must from its structure, be considered a count in case, for a malicious prosecution, and not a count in trespass
2. Where the plaintiff obtains leave until the next term to amend his declaration, a plea in abatement need not be filed until then—but if no time is allowed, the presumption in this court will be, that the amendment must be made *instanter*, and unless the contrary is shewn, will be presumed to have been so made, and a plea in abatement filed at the next term properly rejected.
3. Proof of the hand writing of the justice who took the affidavit and issued the warrant to arrest the plaintiff, at the instance of the defendant, will be sufficient evidence, *prima facie*, of the authority under which the arrest was made.
4. A search of half an hour by a lawyer in his office for a paper which was there three days before, without finding it, will raise a presumption of its loss, and authorize secondary evidence of its contents, especially in a case where no doubt could exist as to its contents. Nor in the absence of proof indicating that it might be found elsewhere, would it be necessary to search elsewhere for it.

ERROR to the Circuit Court of Wilcox.

The writ in this case was sued out by the defendant in error, against the plaintiff in error, to answer in a plea of trespass *vi et armis*.

At the return term, the plaintiff obtained leave to amend his declaration. A declaration was afterwards filed, the first count of which is in the ordinary form for a malicious prosecution; the second count is, and also for that whereas, the said defendant, at to wit, &c., did cause to be seized, arrested and imprisoned in the common jail of Wilcox county, the body of the said plaintiff, and there caused him to be detained and kept in prison for a long space of time, to wit, for twenty-one days, without probable cause, contrary to law and against the will of the plaintiff; whereby the plaintiff was subjected to great expense and loss of time, and was deeply wounded in his feelings and character, from which said imprisonment the plaintiff was finally discharged by order of the judge of the county court, before whom, together with the cause of his detention, the plaintiff had been brought by writ of *habeas corpus;* and the plaintiff avers that the defendant did not further prosecute his complaint against him, but wholly abandoned the same, and the said complaint and prosecution is wholly ended and determined, to wit, at, &c.

At the trial term, the defendant offered a plea in abatement, for a variance between the writ and declaration, which, on motion, the court struck out, because it was not indorsed by the clerk when it was filed. The leave to amend the declaration did not prescribe the time within which it should be done. It did not appear that the declaration had been shown to the defendant until a few days before the commencment of the term.

The defendant then demurred to each count of the declaration, and to both counts for a misjoinder. The court sustained the demurrer to the second count and overruled it as to the first, and as to the misjoinder.

To prevent a continuance, the plaintiff admitted that one Dekle, the justice of the peace who took the affidavit of the defendant and issued the warrant for the apprehension of the plaintiff would prove, if present that they were taken and issued by him. The defendant declining to avail himself of this admission, and to read the papers in evidence, the plaintiff on proof of the hand writing of

the justice of the peace, by one who had seen him write and was acquainted with his hand writing was permitted to read them to the jury against the objection of the defendant, and to which he excepted.

In order to introduce secondary evidence of the contents of the writ of *habeas corpus*, and the proceedings thereon, the plaintiff proved by his counsel that the papers had been in his possession only three days before; that he was under the impression he had handed them to the defendant's counsel, but he denied having received them; that he had made diligent search for them for a half hour that morning, among his papers, but could not find them, and if they were not handed to defendant's counsel he believed some one had stolen them—no search was made in any other place, nor could the counsel say but that on further or longer search, in other parts of his office, or in the court house, they might not be found. Under this state of facts, the court permitted secondary evidence to be given of their contents, to which the defendant excepted.

The jury under the issue, found for the plaintiff five hundred dollars, for which the court rendered judgment.

The assignments of error bring to view the misjoinder of counts, and the matters set forth in the bill of exceptions.

HUNTER, for plaintiff in error cited, 1 Chit. Pl. 126, 130; 4 Por 423.

BECK, *contra*, cited 6 Term R. 136; 2 Wilson, 302; 1 East. 568; 5 ib. 257; 3 Mum. 159; 3 Stewart 172; 3 Ala. 741; 2 ib. 61; 8 Porter 535; 9 ib. 52; 2 J. C. 488.

ORMOND, J.—The question of misjoinder depends upon the character of the second count, whether it is in trespass or in case. The count is very inartificially drawn, but we are to determine its species from its general form and structure. Unaided by the writ, we think it manifest that it was designed by the pleader to be a count in case. It is not alleged, directly and positively, (as in trespass it should have been) that the imprisonment complained of was the immediate act of the defendant, but it is stated by way of recital; "that whereas, &c." This is contrary to all the precedents in an action of trespass. In Taylor v. Rainbow, [2 H. & M. 423,] this recital was held sufficient to characterize the declaration as one in case, and this decision has been adhered to

in many subsequent cases. [See Lomax v. Hood, 3 H. & M. 276.]

It is also apparent that the pleader intended to charge the imprisonment as resulting from legal process, as he alleges that the plaintiff was discharged therefrom by the judge of the county court on *habeas corpus*, that the prosecution is ended and determined, and that the detention was without probable cause, allegations which would be wholly unnecessary in a count in trespass *vi et armis*, and appropriate only to a count in case for a malicious prosecution. Although therefore this count is exceedingly inartificial, and the demurrer to it was properly sustained, judging of it from its structure, we cannot say that it was intended to be a count in trespass. [See Savignac v. Roome, 6 D. & E. 125.]

The 12th rule of practice, for the government of the circuit and county courts, requires the court to reject pleas in abatement, unless it appear from the endorsement of the clerk that they were filed in proper time. Such was the predicament of the plea in this case, but it is supposed that as there was leave to amend the declaration, the rule does not apply. It is true that the defendant could not plead until there was a declaration to plead to, and if the time to amend had been extended to the next term of the court, the plea in abatement would have been in time. But the record does not disclose that such was the fact. No time appears to have been given, and the amendment may, for aught this court can know, have been made *instanter*. It is not therefore shown upon the record that the court erred in rejecting the plea on motion of the plaintiff.

We do not consider it necessary that we should decide whether the admission by the plaintiff, that the affidavit and warrant under which he was arrested, at the instance of the defendant, were those acted on and issued by the justice of the peace, made the papers evidence, so as to authorize him to read them afterwards, the defendant having declined to avail himself of the admission, because we think the proof that they were in the handwriting of the justice before whom the affidavit was taken, and by whom the warrant was issued, was sufficient evidence, *prima facie* at least, to authorize their introduction as evidence of the authority under which the arrest was made. To hold that no proof but that of the justice himself was sufficient testimony of the genuineness of the affidavit and warrant, would frequently amount

to a denial of justice, as he might be dead or beyond the jurisdiction of the court. Such appears to have been the fact in this instance.

We think the preliminary proof offered in this case, of the loss of the writ of *habeas corpus*, and the discharge of the plaintiff from imprisonment, was sufficient to authorize secondary proof of its contents. This question has been repeatedly before this court. In the recent case of Jones v. Scott, [2 Ala. Rep. 61,] it is stated that no fixed rule can be laid down applicable to this class of cases; "that in general a search must be made where the lost paper was last known to be, and that where the presumption can arise that the paper may be improperly withheld—much stricter proof will be required of the loss, and a more rigid search exacted than in a case where no such presumption can be made."

These remarks are quite applicable to this case. Search was made where the paper was last known to be, only three days before—the document itself was of such a nature that there could not well be any dispute about its contents, and therefore no conceivable motive could exist for withholding it. We cannot say that half an hour's search in a lawyer's office, was not sufficient to ascertain whether the paper was not where it was left, nor in the absence of any fact indicating that it might be found elsewhere, can we perceive that there was any necessity to search elsewhere for it. If the admission that the paper, on further search where it was last known to be, or elsewhere, might still be discovered, would preclude the secondary evidence, it would annihilate the rule in all cases where the lost paper was not proved to be destroyed as well as lost, as otherwise there must always be a possibility that it may yet be found. Let the judgment of the court below be affirmed.

HANCOCK AND GREEN, v. THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT DECATUR.

1. A promissory note for the payment of a sum of money to the State Bank or one of its Branches, *eo nomine*, "at the counter thereof," if not in proper form to authorise the summary remedy provided by its charter, is sufficient under the 27th section of the act of 1837, "to extend the time of indebtedness to the Bank, &c."

WRIT of Error to the Circuit Court of Morgan.

This was a proceeding by notice and motion, at the suit of the defendant in error against the plaintiffs, as the sureties of James K. Murrah, in a note by which they all promised jointly and severally "to pay to the Branch of the Bank of the State of Alabama at Decatur, at the counter thereof, twenty-seven hundred dollars, twenty-five per cent. of which is payable on the 30th June, 1838, thirty-seven and a half per cent. on the 30th June, 1839, and the balance on the 30th June, 1840, with interest at the rate of eight per cent. per annum. The note is dated the 11th October, 1837, and on its face purports to have been given for a debt, the payment of which is extended under the act of June, 1837, "to extend the time of indebtedness to the Bank of the State of Alabama and its Branches, and legalizing the suspension of specie payments, and for other purposes." The cause was submitted to a jury on the plea of *nil debet*, and the plaintiff having given in evidence the note above described, the defendants proved by the cashier of the Bank, that at the date of the note the individual indebtedness of Murrah to the plaintiff was nine hundred and fifty dollars, the residue of the sum for which the note was given, was part of the indebtedness of the firm of Murrah & Gamble, of which James K. Murrah was a member. Whereupon the defendants moved the court to instruct the jury, that if they believed the evidence adduced to be true, they should find the issue for the defendant, which motion the court overruled, and instructed the jury, that if they were satisfied of the truth of the testimony, they should find for the plaintiff. Thereupon, the de-

fendants excepted, and their bill of exceptions has been duly certified to this court.

It is assigned for error that the Circuit court erred in refusing to charge the jury as prayed, and in the charge given; *and further* the note not being *payable and negotiable* at the Bank, the charter does not authorize the summary remedy by motion.

McClung, for the plaintiffs in error.

S. Parsons, for the defendant.

COLLIER, C. J.—1. We cannot conceive upon what ground, the Circuit court was prayed to charge the jury that they should find the issue for the defendants, because the note in suit was made for the payment not only of Murrah's individual debt, but for a part of the joint indebtedness of Murrah & Gamble. It is not pretended, so far as we are informed, that the charter of the bank, the act of June, 1837, or the principles of the common law, are opposed to the validity of such a note. This being the case, the charge moved was properly refused, and the jury correctly instructed.

2. The eighth section of the bank charter gives the corporation a summary remedy for the collection of its debts against the "maker or indorser of any note, bill, or bond, expressly made negotiable and payable at said Branch Bank, &c." Under this provision it is insisted that to give the remedy provided, it is necessary that the security sued on, should in *terms* conform to its direction. The view which we take, will make it unnecessary to consider this question; though we would remark that we are by no means certain, that a promise to pay at the counter of the bank, is not equivalent to stating that a note shall be there payable and negotiable, and a substantial compliance with the law. But be this as it may, the question is placed beyond controversy by the twenty-seventh section of the act of 1837, under which the note was made. That section is as follows: "That if any person shall become indebted to any of said institutions by bill, bond, note or other contract for the payment of money, and shall delay payment thereof, the said banks may sue for and collect the same by summary remedy, as in other cases under the charter of said banks." This provision is very general, and we think can not be so connected with any other enactment as to require that

the evidence of indebtedness should be drawn in any particular form. The note in suit appears to have been taken by the Bank, in conformity to the directions of the act, and this in our opinion, is quite sufficient to give the remedy that has been adopted.

The judgment of the Circuit court is consequently affirmed.

CLAY, J. not sitting.

LEGAL REPRESENTATIVES OF THOMAS, DECEASED, v. HOPPER, GARNISHEE, &c.

1. A garnishee who answers that he is indebted to the defendant in execution, cannot be discharged on the ground that he has a claim, as administrator of another person, for a larger amount. Such a claim is in the nature of a set-off, and, not being due in the same right, cannot be allowed as such.
2. A summons of garnishment is not in the nature of an equitable proceeding, but a *legal* remedy, and to be so treated.

ERROR to the County Court of Montgomery.

On the 1st of February, 1843, John D. F. Williams made oath before the clerk of the county court of Montgomery, that the legal representatives of William Thomas, deceased, had recovered a judgment in the Orphans court of said county, for the sum of eight hundred and seventy-one 60-100 dollars, besides costs, against one Anderson Thomas; that the defendant had no property, within the knowlege of affiant, in his possession; but that affiant believed that Joseph D. Hopper was indebted to said defendant, or had effects of defendant in his hands.

Upon that affidavit, a summons of garnishment issued against said Joseph D. Hopper in the usual form, requiring him to appear before the next county court of said county, and answer on oath, in what amount he was indebted to said defendant, and what effects of said defendant he had in his hands, &c.

Said summons was returned with acknowledgment of service

endorsed thereon, and at the proper time, the garnishee appeared and answered that on the 1st of February, 1843, he had in his hands, as administrator of John Thomas, deceased, of whom Anderson Thomas, the defendant in the execution, was one of the heirs at law, about two thousand dollars; of this sum, by the order and decree of the Orphans' court the sum of five hundred and forty-nine 67-100 dollars, was ordered to be paid to the said Anderson Thomas; said garnishee further made oath, that previous to the service of said garnishment, the said garnishee, as administrator of Martha Thomas, deceased, held a judgment, or decree of the Orphans' court of said county, against said Anderson Thomas for about the sum of twenty-nine hundred dollars, and claimed to hold the amount due from him to said Anderson Thomas, to apply, *pro tanto*, to the payment of said judgment, held by him as administrator of said Martha Thomas against said Anderson Thomas: Whereupon the court adjudged, that the sum due from said garnishee, as aforesaid, was liable, and subject to the judgment debt held by him as administrator of said Martha Thomas, deceased, and not subject to said garnishment—and further ordered that said garnishee be discharged, go hence, and recover costs, &c.

To reverse this judgment, the plaintiffs prosecuted this writ of error, and now assign for error,

1. That from the return of the garnishee, judgment should have been rendered against him, for the amount admitted to have been in his hands.

WILLIAMS, for the plaintiff error.
ELMORE, *contra.*

CLAY, J.—The court cannot regard a summons of garnishment as an equitable proceeding, as insisted by the counsel for the defendant. The several acts which have been passed by our Legislature, authorising this process, in favor of plaintiffs who have obtained judgments, require the garnishee, when summoned, to be examined and proceeded against, "in the same manner as required by law against garnishees in original attachment." Then, the proceeding may be safely assimilated to that by attachment. Indeed, it may be regarded as a species of attachment; and treated as a branch of that remedy. Formerly, in this

state, and still in some, if not most of the other states, the attachment laws were construed with great strictness, as giving an extraordinary remedy, somewhat harsh, and the mere creature of statute. This strictness of construction went so far here, that proceedings in attachment were often quashed, or reversed, for defects of *form*, which were unimportant to the merits of the case. In consequence of the frequent instanstances in which the remedy was thus lost, and the substantial justice of the case defeated, the Legislature enacted that, "the attachment law of this State shall not be rigidly and strictly construed;" and, furthermore, authorised amendments of " any defects of *form* in the original papers, should the judge, or justice be satisfied, that such defects were not made for the purpose of defrauding the defendant in such suit." Still, this did not change the character of the proceeding, from a *legal* to an *equitable* one. It went far to place attachments on a footing with other proceedings in our courts of law, in which defects, or want of form, had long before been amendable; and the most that can be claimed under the act authorising such amendments of defects of form in attachments, or garnishments, would be to sustain them, as other suits at law, and determine the rights of the parties by the same legal principles, that would apply, if suit had been commenced by ordinary process.

Assuming these views to be correct, how stands the case before us? The represntatives of William Thomas, deceased, have sued the garnishee as a debtor of Anderson Thomas, who has no property in possession. The garnishee acknowledges that he is indebted to him in a certain sum, which he holds in his hands as administrator of John Thomas, deceased, and which has been adjudged against him by the Orphans' court, in favor of said Anderson Thomas. Here, then, is a debt, for a specific sum, due from the garnishee to Anderson Thomas, for which he may sue, or have execution. How does the garnishee seek to avoid the recovery? By alleging that, as administrator of Martha Thomas, deceased, not in his individual right, nor as administrator of John Thomas,—he has a judgment, or decree against said Anderson Thomas, for a larger sum. Then, his defence is in the nature of a set-off; and the question arises, whether it is such an one, as the law will allow? To test this question, it is only necessary to enquire, whether the garnishee holds his claim against

Anderson Thomas in the same right, in which he is called upon to answer. Could he institute an action individually, or as administrator of John Thomas, and recover of Anderson Thomas the claim he sets up? We think not; for he says his claim is held in the right of being administrator of Martha Thomas, deceased. This has been laid down by this court, as the decisive test of the admissibility of a set-off. In the case of Pierce & Baldwin v. Hickenburg, [2 Porter, 196,] the plaintiffs had brought an action of assumpsit against the defendant in the circuit court of Tuscaloosa county. They declared for goods sold by the firm, to the defendant, and he relied on the pleas of *non assumpsit*, payment, and set-off in short. On the trial, the defendant offered as a set-off, a judgment obtained by him against Pierce, one of the partners, which was objected to, but admitted by the court, and the question turned entirely on the correctness of the opinion of the court, admitting the judgment as a set-off. This court held it to be "clearly inadmissible," and put the question—"could the defendant, by adopting a separate action, *for which the set-off is only a statutory substitute*, recover from the plaintiff, the amount of this judgment? Certainly he could not.

The case of Rapier, administrator of Mays, against Holland and Bruce, [Minor's Rep. 176,] shews how far this court has gone in sustaining the principle, that the debt, to be allowed as a set-off, must be due *in the same right* as that sued on. In the case cited, Rapier sued the defendants on a bill single given to him, as administrator. The defendants pleaded that Mays, at the time of his death, was indebted to Holland in a larger amount than the sum claimed in the declaration—replication, that at the time suit was commenced, the estate of Mays had been declared insolvent &c. special demurrer to this replication and joinder, and the circuit court sustained the demurrer, from which judgment Rapier prosecuted the writ of error—and this court held: "If we were to admit that the special replication of the plaintiff was bad, we should be bound to look back to the first error of the party demurring; there can be no doubt, but that the defendant's plea of set-off was bad, and would have been so held on general demurrer. In an action on a promise made to an administrator, a debt due from his intestate cannot be set-off; the demands are due in different rights, &c."

These decisions seem to settle the question: the claim proposed

to be set-off by the garnishee, in the case at bar, is not due to him in the same right, as that for which he is sued, or garnisheed; nor could he maintain an action in the character, in which he is garnisheed, for the claim he would set-off. Consequently, the court below erred in giving judgment for the garnishee, and the judgment must be reversed, and the cause remanded.

HEIRS, ET ALS. OF PUGH v. CURRIE.

1. Where real estate is purchased by a commercial partnership with the partnership funds, for the purpose of sale, to pay the debts of the firm, it will be considered, in equity, as part of the stock in trade, and therefore, as personalty, will go to the surviving partner.
2. In such a case it will make no difference that the title is in the deceased partner alone, his heirs will be considered trustees for the survivor.

ERROR to the Chancery court of Barbour.

The bill was filed by the defendants in error, and charges that a partnership existed between themselves and James Pugh, deceased, in the mercantile business, under the firm of James Pugh & Co.—that the business was unprofitable, and the firm largely in debt; that for the purpose of acquiring means to pay off and satisfy said debt, the defendant, Pugh, without their knowledge, but with the money of the firm, and intended for its benefit, entered at the land office in his own name, nine tracts of land, which are described, and in the purchase vested the sum of eleven hundred and eight dollars twenty-three cents; that the debts of the firm have not been paid, and that they have been compelled to pay large sums out of their individual property, on account of the partnership debts; that Pugh has departed this life, leaving a widow and children; that the widow and one Landingham, administered on the estate; that the widow subsequently married one Revenbach, who in right of his wife became co-administra-

tor with Landingham; that they have reported the estate of their intestate insolvent, and filed a petition in the county court praying a sale of his lands, and that the lands are insufficient to pay the outstanding debts of the firm. The prayer of the bill is for a sale of the lands to pay the firm debts, and for general relief.

Revenbach and wife answer the bill, and deny any knowledge of the partnership, as charged in the bill; they admit the estate of the deceased to be insufficient to pay the debts of the estate without a sale of the land; that a decree was obtained from the orphans' court to sell the land mentioned in the bill before the filing of the bill, and that the same was sold under the decree; that the complainant aided in procuring the lands to be sold; was present when they were sold, and did not interpose his claim; and all knowledge as to the funds with which the lands were purchased, and know nothing of the state of the firm accounts. They also rely upon a decree of dismissal to a previous bill filed by the complainant, having the same object in view as the present bill, and demur to the bill for want of equity.

The other administrator, Landingham, by his answer, states that he always understood there was a partnership existing between the deceased and complainant and one McKenzie, in the sale of merchandize and negroes; does not know the state of the firm accounts, but insists that a large amount of debts and effects of the firm came to the hands of the complainant; admits that the estate of Pugh has been declared insolvent, and the lands of deceased sold by a decree of the court; that complainant did not forbid the sale, but became the surety of the purchaser of the land; admits that the lands were entered in the name of the deceased, but whether purchased with his own funds, or of the firm, does not know. There is also a demurrer to the bill.

There is also the usual answer of the guardian *ad litem* of the minors.

The proof, which is quite voluminous, shews that the partnership existed as stated in the bill; that the business was unprofitable, and that the complainant has been compelled to pay a large sum of money on account of the firm; that the lands were entered by the deceased with the money of the firm, and for the purpose of paying the debts of the firm; and that the complainant was present at the sale of the land under the decree of the county court, and forbade it.

The chancellor decreed a sale of the land, from which decree this writ is prosecuted.

The assignments of error are,

1st. That there is no equity in the bill.

2d. The court erred in the decree made.

Goldthwaite, for plaintiff in error, cited 7 Vesey, 453; 9 ib. 500; Gow on Part. 54; 1 R. & M. 45; 2 Edwards, 28; 6 Yerger, 20; 4 McCord, 519; 15 Johns. 159; 2 Rand. 183.

ORMOND, J.—Real estate held by a partnership for partnership purposes, is as between the partners themselves and their creditors, considered and held as mere personalty; but whether it is to be so treated upon the death of one of the partners, and the right to vest in the surviving partner, or whether to give it that effect there must not be an agreement between the partners, by which the land is to be considered as stock, and thus be converted into personalty, appears to be considered a doubtful question at this day in England. [See Thornton v. Dixon, 3 Bro. C. C. 199, where the latter was held to be the true rule, and the note of Mr. Belt; also Story on Partnership, 128; Gow on Part. 54; Fereday v. Wightwick, 1 Russel & M. 45; Broom v. Broom, 3 M. & K. 443; Phillips v. Phillips, 1 M. & K. 649.]

The facts proved in this case, however, place it beyond the pale of this controversy. It appears from the evidence that the lands were purchased with the funds of the partnership, for the purpose of sale, to pay the debts of the firm, and were partially improved to enhance their value and give them a ready sale. The effect of this agreement is, that the land must be considered as a part of the stock in trade, and is thereby converted into personalty, and as such, belongs to the surviving partner to enable him to pay the debts of the firm.

It can make no difference whatever that the land was entered in the name of the deceased partner—the heirs will, in a court of equity, be considered as trustees of the surviving partner. Let the decree of the chancellor be affirmed.

PHELAN v. FANCHER.

1. The claimant of property under the statute, cannot object on error, that the jury in condemning it to the satisfaction of the plaintiff's execution, have not found the value of each article separately.
2. The issue on the trial of the right of property, is an affirmation on the one side that it is liable to plaintiff's execution, and a denial on the other; and a verdict finding the issue in favor of the plaintiff, is equivalent to an affirmance of its truth *in totidem verbis*.
3. It is permissible for a plaintiff to waive every thing to which the verdict of a jury has ascertained he was entitled, and have a judgment rendered, for costs alone.
4. Where the judgment is rendered in favor of the "plaintiff," where there are more than one, it will be intended to be a mere clerical error.
5. The claimant of property cannot object on error, that a judgment rendered on a verdict against him, does not subject the property to the execution, or order a sale.

WRIT of error to the Circuit Court of Shelby.

This was a trial of the right of property, under the statute, at the suit of the defendant in error, as the plaintiff in execution, against the plaintiff and his wife. The husband alone makes the affidavit, and executes the bond, but the affidavit affirms, that the two slaves levied on are the property of the husband and wife, in right of their infant children, who are particularly named. The condition of the bond also describes the claim as being interposed by them as trustees for their children: the issue is made up between the plaintiff in execution and the claimants; and the judgment entry, after reciting the appearance of the parties, and the empannelling the jury, proceeds thus, "upon their oaths do say they find the issues in favor of the plaintiff, and the property levied on under the execution in favor of the plaintiff, and to be sold in satisfaction thereof. It is therefore considered by the court, that the plaintiff recover of the claimant the costs of this suit, for which execution may issue, &c."

MOODY, for the plaintiff in error, insisted, that the verdict does not find the value of the property, nor does it determine that it is subject to the execution. [Aik. Dig. 170.] The judgment is

also defective, because 1. It is for costs alone—[2 Stew'ts Rep. 10.] 2. It is against only one of the claimants. 3. It does not subject the property to the execution, or order a sale.

No counsel appeared for the defendant.

COLLIER, C. J.—In Hardy, et al. v Gascoignes & Holly, [6 Porter's Rep. 447,] it was determined, that although the act of 1828, "The better to provide for the trial of the right of property, and other purposes," requires the jury in all cases, where they shall find the property levied on subject to the execution, to find the value of each article separately. Yet as the claimant cannot be prejudiced, but rather benefited by the omission of the jury to perform that duty, he cannot avail himself of it as a ground of error. [See also, Burnett, Wilroy & Co. v. Maxey, 9 Porter 410.]

The issue submitted to the jury is an affirmation on one part, that the property is liable to be sold to satisfy the plaintiff's execution, and on the other a denial of that averment. A verdict, finding this issue in favor of the plaintiff, is equivalent to an affirmance *in totidem verbis*, of its truth in the precise terms in which it is stated; but if more was required, it may be found in the verdict as recorded. The jury do not stop with finding the issue in favor of the plaintiff, but the verdict goes farther, and asserts that the property levied on is liable to be sold in satisfaction of the execution.

In Pickens v. Hayden & Meriam, [2 Stew't, 10,] it was decided that a judgment by *default* for costs only, was irregular, and it is argued, that that case is conclusive against the judgment in the present, because it is there said that a judgment for costs only, unless it be by confession, is erroneous. The question was not whether, if the judgment had been confessed it should be reversed, but the court merely mentions a judgment in that form as excepted from the influence of its decision; and as it was not the matter of inquiry presented by the record, the remark in the opinion cannot be allowed to exclude all other exceptions. Judgments on verdict seem to us to occupy a position quite as favorable as any other; and if the jury have ascertained the plaintiff's right of recovery, it is competent for him to waive either expressly or impliedly, every thing accorded by the verdict, and take his judgment for the costs alone. By failing to cause a judgment to

be rendered according to the terms of the verdict, the plaintiff in execution may, *in the form in which this case is presented*, be understood as assenting to a relinquishment of every thing but his costs.

The judgment, it is true, is in the singular number, viz: "that the plaintiff recover of the claimant, &c.;" but this has been frequently held to be a mere clerical error, and the intendment is, that the recovery is against those who are parties to the issue.

The objection that the judgment does not subject the property to the execution, or order a sale, is one of which the claimants can not avail themselves. If it be an error, it rather benefits than prejudices them, and the rule is, that a party can not avail himself of an error committed in his favor.

We have not thought it necessary of our own motion, to say any thing of the writ of error being sued out by one of the claimants only. Our conclusion is, that although the proceedings evince a disregard of every thing like technicality, there is no error which will avail the claimants; and that the judgment must be affirmed.

POLLARD v. STANTON.

1. When a plea is taken in short, by consent, it must contain *substance—form* only is waived.
2. Notwithstanding a joint obligor of a bond, or maker of a promissory note may appear on its face as a principal, he may prove, by parol, he was a security; such having been understood as the relation of the parties between themselves.
3. A plea that plaintiff and defendant were partners in the transaction, though a note may have been given by them as principal and security, would be a good defence against an action brought by the latter, against the former, to recover the amount paid by him in the discharge of such note, or evidence of the partnership may be given, under the plea of *non-assumpsit*.

ERROR to the Circuit Court of Montgomery.

This was an action of *assumpsit*, brought by the plaintiff against the defendant in error and one Charles Labuzan, in the circuit court of Montgomery county. The declaration was in the usual form, for work and labor done; goods, wares and merchandize sold and delivered; for money laid out and expended; and for money paid and advanced, to the amount of thirty-five thousand dollars. In the mean time, Labuzan died, and the action abated as to him.

The defendant, Stanton, relied for his defence on the pleas of 1. *Non-assumpsit.* 2. Payment. 3. Set-off, and 4. Partnership between the plaintiff and defendants *in short*, To the 4th plea, there was a demurrer, which was overruled by the court—and issue on all the pleas.

On the trial, a bill of exceptions was taken, which sets forth that the plaintiff offered in evidence, four notes; one for $5,123 12-100; one for $4,778 39-100; one for $2,955 80-100; and one for $12,180 62-100, all bearing date on the 10th February, 1838, payable at different periods, reciting in the body of each note, "we, Charles Labuzan and Benjamin Stanton, jun'r as principals, Charles Barney & Co. and Charles T. Pollard, as securities, jointly and severally promise to pay to the order of Wm. J. Ingersoll, Esq. cashier of the Bank of Mobile, or his successor in office, [the sums for which they were respectively drawn] for value received negotiable and payable at the Bank of Mobile, and signed,

Charles Labuzan,
Benj. Stanton, Jr.
Charles Barney, & Co.
Chales T. Pollard."

The plaintiff proved that the said several notes were executed by the parties whose names are signed thereto, and that they were paid by the plaintiff to the holders, the Bank of Mobile, and the Planters' and Merchants' Bank of Mobile.

The defendant then offered to prove, that before bringing this suit, the plaintiff and defendants were partners; that the demands, for which said notes were given were partnership debts, as between the plaintiff and defendants; to which evidence the plaintiff objected, but the objection was overruled by the court, and the evidence permitted to go to the jury; and to that opinion the plaintiff excepted.

The cause was then submitted to a jury—a verdict rendered

for the defendant, and judgment given thereon by the court. To reverse that judgment, the plaintiff prosecuted his writ of error to this court, and now assigns the following errors:

1. That the court erred in overruling the demurrer to the 4th plea.

2. That that court erred in overruling the objection to the testimony, and permitting the evidence to go to the jury.

G. Goldthwaite, for plaintiff in error.

Belser, *contra.*

CLAY, J.—The first question which seems to be presented by the record, is whether the circuit court erred in overruling the demurrer to the 4th plea? That plea was put down in short, by consent, we presume, and is in these words: "Partnership between plaintiff and defendants." To this plea there was a demurrer, in short, which was overruled by the court, and we think incorrectly. It is a great convenience to the bar, to save the unnecessary and unprofitable labor of writing out many of the ordinary pleas, the substance and legal effect of which are as well understood by their respective names, as if they were formally written. Such is the case, in regard to the general issue in almost every form of action, and the usual pleas in bar. An agreement, however, to take a plea in short, must be understood as a mere waiver of *form* and not of *substance;* it must convey some precise and definite idea of the matter of defence, and must be sufficient in substance. The allegation in this plea was simply, "partnership between plaintiff and defendants," not stating *when* the partnership existed, commenced or determined; nor whether it was in relation to the subject matter of the contract, or transaction on which the suit was brought, or of what particular character.

In the case of Gayle v. Randle, [4 Porter 232,] the defendant in the court below, pleaded "in short, that he was only security, and requested suit brought vs. Miller principal, who has since become insolvent, and absconded." To this plea, there was a demurrer sustained, and on the case being brought here, the judgment of the court below was affirmed, the court remarking, that "when special pleas are agreed to be taken in short, by consent

of counsel, it can only be understood by the court that matters of form are waived—they must contain substance, &c."

The bill of exceptions shews, that in the further progress of the trial, the defendant offered to prove, that before the institution of this suit, the plaintiff and defendant were partners, and that the demands for which the several notes referred to, were given, were partnership debts, as between the plaintiff and defendant. This evidence being objected to by the plaintiff, and admitted by the court, notwithstanding the objection, presents the next question for consideration. It is insisted by the counsel for the plaintiff, that the defendant is estopped to prove this, because it would contradict the face of the notes, which recite, that the defendant and Labuzan were principals, and the plaintiff and another securities therein.

The question presented by this objection is very different, as between the joint and several makers of these notes, from that which would exist between the makers and the payee; or, if these were bonds, and the question raised between the obligors and obligee. The latter, was the state of facts in the case in 10 Peters, 257, of Samuel Sprigg, plaintiff in error v. The Bank of Mount Pleasant. There, the action was on a bond, given by Sprigg and others, to the Bank, reciting that the obligors were bound "as principals." The pleas alleged that the said Sprigg and others were only securities for Peter Yarnall & Co., and that they were discharged from the obligation, in consequence of indulgence, or forbearance, expressly extended by the Bank to the principal, beyond the day fixed for payment. The case cited differed from the case at bar in several particulars. 1st. The case of Sprigg was on a *bond*, where the doctrine of estoppel more properly applies. 2d. The case in which the question arose, was between the *obligor* and *obligee;* and 3d, the bond had not been paid, and all right of action upon it extinguished. In the case under consideration, the notes had been fully paid and discharged; all right of action upon them had been fully extinguished, and they had ceased to be of any obligatory force, whatever.

In the case of the Grafton Bank v. Thomas Kent, reported in [4 New Hampshire, 221,] the action was brought on a joint and several promissory note, given to the Bank by one Hale and the defendant. Both makers appeared on the face of the note to be equally principals, as nothing was said to the contrary. Kent

pleaded that he signed the note as a surety only, and that he had been discharged by day of payment given to the principal without his consent or knowledge. On hearing the case, the court went into a very full review of the various decisions and authorities on the question involved, and in conclusion, laid down a rule, which seems to us to be safe and reasonable. The court said:

"We are, on the whole, of opinion, that the rule is, when a maker of a note, who has signed as a surety, does not appear on the face of the paper to be a surety, he is to be considered and treated as a principal, with respect to all those *who have no notice of his real character; but, that wherever it is material, a defendant may shew by extrinsic evidence, that he made the note as a surety only, and that it was known to the plaintiff that he was only surety.*"

This, it will have been observed, is a case between the maker and payee, yet the court held, in effect, if the payee *had notice* that the maker signed only as surety, it might be relied on in defence, and shewn by extrinsic evidence; and this too, notwithstanding the payee might appear to be a principal on the face of the note: and what well founded objection is there to the rule, that requires the payee of a note, which is signed by several, one of whom is known to him to have signed as security only, to treat the security as belongs to his real character? But, in the case at bar, the question arose between joint, or joint and several makers, who must be presumed to know in what character each of the parties signed, and besides, as we have before intimated, the notes had been paid, and all obligation, arising under them, had been extinguished. Nor was the question between the makers and the payee, or any one holding under him, but between the makers themselves.

Again: the evidence offered was to prove that the plaintiff and defendants were partners, and that the demands for which the notes were given, were partnership debts, as between the plaintiff and defendants. If the presumption arises, as we have seen, that ordinary joint makers know in what character each has signed, much more may it be presumed that partners who are giving a note for a partnership demand, must be acquainted with the character which they bear in relation to each other.

Can one partner maintain an action at law against another, for moneys paid, advanced, or contributed on account of the partner-

ship? We answer, he cannot, because "in the first place, upon the mere technical principles of the common law, one partner cannot sue the other for a contribution, or payment made for a just partnership liability, for in such a suit, all the partners, including himself, must be made defendants; and it is clear, upon the acknowledged principles of pleading at the common law, that a party cannot at once be a plaintiff and a defendant in the same suit; or, in other words, he cannot sue himself either alone, or in conjunction with others. But a reason far more satisfactory, because it is in no shape founded on technical principles, is *that until the partnership concerns are ascertained and adjusted, it is impossible to know whether a particular partner be a debtor or a creditor of the firm;* for although he may have advanced large sums on account thereof, he may be indebted to the firm in a much larger amount." [Vide Story on Partnership, 323, 324, 325.]

Such being understood, as the true principle which governs the question—it follows, necessarily, that a plea might be so framed with proper averments, as to constitute a bar to a plaintiff's recovery. Such a plea was not, however, filed in this case, but there was issue joined on the plea of non-assumpsit, and we do not doubt that the evidence was admissible under that plea; because it went to shew that the demand sued for was not a legal one, and that the plaintiff had no right to recover in a court of law; for if the plaintiff did pay the money, he paid it as well for himself, as for others, who were his partners, and we have seen, that in such a case an action at law will not lie.

Let the judgment be reversed and remanded.

LAZARUS v. LEWIS.

1. A having a judgment against J for twenty-seven hundred dollars, obtained in an action of slander, agreed with J that if he would pay him seven hundred dollars to defray his expenses and pay the costs, and would convey to one J L property sufficient to discharge the residue of the judgment in trust for the separate use of the wife and children of J, and J accordingly made the conveyance: *Held*, that if the transaction was *bona fide*—if the judgment was not collusive, and the conveyance to the use of the wife and children of J was not intended to secure to J through the apparent ownership of his wife and children, the enjoyment of the property, that it was valid as a gift from A. That such an instrument as it was, for a valuable consideration, and absolute in its terms, was not required to be recorded either by the act of 1803, or by that of 1828; and that the consent of A to the conveyance could be established by proof, *dehors* the deed.
2. Where there are three subscribing witnesses to a deed, one of whom is dead, another resident out of the State, and the third one being called is not able to prove the delivery, the execution of the deed may be proved by other persons, and it is not indispensable to prove the hand writing of the absent witnesses.

ERROR to the Circuit Court of Butler.

This was a proceeding to try the right of property to certain slaves, in which the plaintiff in error was the plaintiff in execution, and the defendant claimed the property as trustee, in a deed executed by the defendant in execution.

The deed of trust, which was offered in evidence, recites that one Asa Arrington had recovered from Henry T. Jones, (the defendant in execution) in an action of slander, the sum of twenty-seven hundred dollars; that Jones and Arrington had entered into an agreement in writing, that Jones should pay Arrington seven hundred dollars, that sum being sufficient to pay the expenses of the suit, and that the residue should be paid to John Lewis, sen'r, in trust, for the benefit of the wife and children of Jones, to the separate use of the wife, free from the control of her husband. The deed then proceeds thus: "Now know ye, that I, the said Henry T. Jones, for and in consideration of the said debt of two thousand dollars, and of the premises, and of ten dollars to me in hand paid by the said John Lewis, sen'r, trustee, hereinafter nam-

ed, do hereby bargain and sell, convey and confirm unto the said John Lewis, sen'r, the following negroes, viz: Henly, about sixteen years old, valued at five hundred and fifty dollars; Maria, a girl, about eight years old valued at two hundred and fifty dollars; Major, a boy about four years old, valued at one hundred and seventy-five dollars; Dick, a boy, seven years old valued at two hundred and seventy-five dollars, to have and to hold, together with the increase of the females thereof, forever, upon the trust hereinafter expressed, viz: the said Lewis is to hold the said negroes upon the trust and for the use of Frances W. Jones, wife of said H. T. Jones now living, and hereafter to become and for their sole and separate use, free from the control or debts of the said H. T. Jones, and hold the same solely as trustee and allowing them to have the possession and services of the said slaves; and I the said Henry T. Jones reserve no power of revocation to this conveyance whatsoever. Given under my hand and seal," &c. Appended to the deed is an acknowledgement by the trustee, that he will accept and execute the trust which is signed and sealed by him, and witnessed by two witnessess.

The deed was recorded on the following certificate, which bears the same date as the deed.

"I, Matthew Patton, a justice of the peace, in and for said county, do certify, that I saw Henry T. Jones sign the above deed of trust, and likewise saw the above witnesses, to wit, &c. sign the same as witnesses to said deed of trust, all in the presence of each other. Given under my hand and seal.

MATTHEW PATTON, J. P."

One of the subscribing witnesses to the deed, being proved to be dead, another resident out of the State, and the third, who was called, not being able to prove the delivery, the court permitted the execution of the deed to be proved by Patton, before whom it was acknowledged, to which the plaintiff excepted.

The plaintiff also objected to the deed because of the defective record; also, because as the equity of redemption could be sold, the trustee could interpose no claim. That as Arrington was not a party to the deed, he was not bound by it, and there was therefore no consideration for the conveyance of the property. Because also, the deed did not carry out the agreement in writing between Arrington and Jones; and lastly, because the deed was void in consequence of the interest reserved to the grantor, but the

court permitted the deed to be read in evidence to the jury, to which the plaintiff excepted. The court also permitted Arrington to be examined as a witness, to prove his assent to the deed, to which the plaintiff also excepted.

Judgment being rendered in favor of the claimant, the plaintiff prosecutes this writ of error, and assigns for error,

1. In the proof of the execution of the deed.

2. In permitting the introduction of the deed in evidence, because of defective record, and because as Arrington was not a party to the deed, he was not bound by it, and there was therefore no consideration to make the deed valid.

3. The trustee could not dispute the levy, as the equity of redemption was subject to sale.

4. The court erred in permitting Arrington to prove his assent to the deed.

Crenshaw, for plaintiff in error.
Cook, *contra.*

ORMOND, J.—In Thomas v. Wallis, at the last term, we held, that where all the witnesses to a deed were dead or beyond the jurisdiction of the court, proof of the hand writing of one of the witnesses was sufficient evidence, *prima facie*, of the execution of the deed to authorise it to be read to the jury. In this case, one of the subscribing witnesses was called, but was unable to prove the delivery. This is in principle, the same as if the testimony of the witness could not be obtained, and will authorise the introduction of other testimony to prove the due execution of the deed. [1 Phil. Ev. 475; Russell v. Coffin, 8 Pick. 143.]

Although proof of the hand writing of the attesting witness where his testimony cannot be had, or is unable, from forgetfulness, or from any other cause, to testify to the due execution of the deed, has been held sufficient evidence, *prima facie* of its execution, it by no means follows, that that is the only *media* of proof in such cases. On the contrary, if any suspicion whatever, is cast on the transaction, it is usual to require corroborating evidence, as for example, proof of the hand writing of the obligor. [See the cases collected on this head, in the 3d vol. C. & H. Phillips' Ev. 1300.] The proof in this case was that of a person who, although not a subscribing witness, appears to have been

present when the deed was executed, and by the evidence of a justice of the peace, before whom it was acknowledged by the grantor, for the purpose of registration. This was certainly much more satisfactory proof of its execution than would have been the proof of the hand writing of an absent subscribing witness, and was, in our opinion, sufficient to permit it to be read to the jury.

The remaining questions all depend on the construction of the deed and its validity, as a conveyance of the slaves.

It appears that one Asa Arrington had recovered from Henry T. Jones, (the defendant in execution,) a judgment for twenty-seven hundred dollars, in an action of slander; that Arrington agreed in writing with Jones, that if he would pay him seven hundred dollars, which would defray the expenses he had been put to in the prosecution of the suit, and pay the costs of the suit, and also pay the remaining sum of two thousand dollars to one John Lewis, sen'r, in trust for the benefit of the wife and children of Jones, that he would enter satisfaction on his judgment against Jones. A deed was accordingly executed by Jones, which after reciting these facts, conveys certain slaves to Lewis at prices which are named in the deed, and which in all are estimated at twelve hundred and fifty dollars, in trust, for the separate use of the wife, and as it would seem also, for the use of the children, though some words appear to be omitted; and securing to them the right to the possession and services of the slaves.

The objections raised to this deed, are first, that it was recorded on a defective certificate of its execution. We will not enter upon the enquiry, whether a defect in the *certificate* of the justice of the peace that the deed was proved to be executed, when in fact full proof of its execution, or an acknowledgment of that fact by the maker was made before him, would invalidate the *registration* of the deed, because we think this deed was not required by law to be recorded.

The statutes requiring registration of deeds of personal property are first, the statute of frauds (so called,) to be found, in Aik. Dig. 207. The second section declares "and moreover, if any conveyance be of goods or chattels, and be not on *consideration deemed valuable in the law*, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing acknowledged and proved. If the

same deed include lands, also in such manner as conveyances of lands are by law directed to be acknowledged or proved, or if it be of goods and chattels only, then acknowledged or proved by one or more witnesses in the superior or county court, wherein one of the parties lives, within twelve months after the execution thereof, or unless possession shall really and *bona fide* remain with the donee." The remaining part of this section relates to a *loan* of property, or the reservation of a condition, reversion or remainder in goods or chattels, which the statue requires to be by will or deed, &c., and in like manner recorded within 3 years.

The 3d section is, "this act shall not extend to any estate or interest in any lands, goods or chattels, or any rents, common or profit out of the same, which shall be upon *good* consideration and *bona fide* lawfully conveyed or assured to any person, body politic or corporate."

This portion of this statute has received a construction by this court in Killough v. Steele, [1 S. & P. 62,] and again in Baker v. Washington, [5 ib. 142.] It was there held, that the act did not make it necessary to the validity of a deed made upon an absolute or conditional sale of personal property upon *valuable* consideration, that it should be recorded within twelve months, and that the term *good* consideration in the 3d section, meant *valuable* consideration. That the design of the statute was to operate on conveyances not founded on valuable consideration, where the possession did not remain with the *donee.*

In 1828 an act was passed, requiring all deeds and conveyances of personal property to *secure any debt or debts*, to be recorded in the office of the clerk of the county court, within thirty days, or that the same should be void against creditors and subsequent purchasers without notice. [Aik. Dig. 208, § 5.]

The deed in this case, is not a deed made in trust, to secure a debt, and is neither within the letter or spirit of the last act. As the conveyance was for the benefit of a married woman, a trustee was interposed in whom the legal title was vested, not for the purpose of securing the payment of debts, but absolutely and without reservation, for the benefit of the *cestuis que trust.* It is therefore not within the statute of 1828, which only requires the registration of deeds, made upon condition, nor within the act of 1803 first cited, because it is a conveyance upon a *valuable* consideration, assuming, as we must do in this case, from the man-

ner in which the question is presented, that the judgment obtained by Arrington, was *bona fide*, and not collusive; that the gift by Arrington, to the wife and children of Jones, was also *bona fide*, and not intended through the apparent ownership of the wife and children to secure to Jones the enjoyment of this property, and that the slaves were fairly valued. We do not doubt that the consideration was a valuable one; Jones was indebted by judgment to Arrington; he could therefore doubtless have sold this property to him in discharge of the judgment, and Arrington could certainly have given it to the wife and children of Jones. Can it make any difference that by this direction, and in discharge of the judgment, Jones made the conveyance directly to the trustee for the same purpose? As therefore, the conveyance, by the direction of Arrington, discharged *pro tanto* the judgment; it was in fact, a monied consideration, and therefore, as the deed was absolute, and the consideration valuable, it was not such an instrument as the act of 1803 required to be recorded.

A deed made upon a full and valuable consideration, and absolute in its terms, might be declared fraudulent if there was no change of the possession, and this circumstance was not satisfactorily explained, as has been repeatedly held in this court; for the act of 1803 merely declares that *registration* shall not be necessary to the validity of the deed, and does not interfere with the presumption of the common law, that possession remaining with the grantor after an absolute sale, is a badge of fraud. No question was mooted in the court below, so far as we can judge from the record as to the possession being unchanged. It could, however, admit of but little doubt, that the possession by the wife, of property, held by her to her sole and separate use, would not be the possession of the husband, though he might reside under the same roof with her.

It was further objected that the deed was void, because Arrington was not a party to it. It was certainly necessary to prove the consent of Arrington to the conveyance, which was merely proving the payment of the consideration expressed in the deed, as it was in effect a payment of the judgment. This was a fact *dehors*, the deed which it was competent to prove, either by Arrington or by a third person.

These views dispose of all the assignments of error. The deed

being upon a valuable consideration and absolute to the wife and children, reserving no interest to the grantor, there was nothing upon which the plaintiff's execution could operate, and the claim was therefore properly interposed by the trustee.

Let the judgment be affirmed.

OOTON v. THE STATE.

1. Although the 22d section of the 8th chapter of the Penal Code, requires the court to sentence a convict who fails to pay the fine and costs, to the county jail for a definite time; yet, if the court fails to render such judgment, and in lieu thereof, directs that he "remain in custody until the fine and costs are paid," he cannot object on error, to the regularity of the judgment, as it is more beneficial to him than the law requires, and he may obtain a discharge from imprisonment upon taking the oath provided for insolvent debtors.

WRIT of Error to the Circuit Court of Shelby.

The plaintiff in error, was indicted for malicious mischief in killing a bay filly, the property of Richard Booth, of the value of fifty dollars. To the indictment the defendant pleaded *not guilty*, and on that plea the cause was tried. The jury returned a verdict of guilty; that the filly mentioned in the indictment, was the property of Richard Booth, and assessed the fine at one hundred and seventy-five dollars, which was five fold her value. A judgment was rendered as follows: "It is therefore considered by the court, that the State of Alabama recover of the defendant, the fine aforesaid assessed, for the use of said Richard Booth, together with the costs of this prosecution, and that defendant remain in custody, until the fine and costs are paid: and it is further ordered and adjudged by the court, that the said Washington Ooton, the defendant, be confined in the common jail of the county of Shelby, for the space of thirty days, and the sheriff of Shelby county, be charged with the execution of this order."

MOODY, for the plaintiff in error.

ATTORNEY GENERAL, for the State.

COLLIER, C. J.—The fifth section of the fourth chapter of the act "regulating punishments under the Penitentiary system," enacts that a person guilty of the offence with which the defendant was charged, shall, on conviction, be fined in a sum equal to five fold the value of the property injured or destroyed, and shall be imprisoned in the county jail for a term not exceeding six months. By the 22d section of the 8th chapter of the same act, it is enacted, that "in all cases punishable by fine only, or fine and imprisonment in the county jail, when the fine assessed, together with all costs, are not paid, it shall be the duty of the court to sentence the convict to the county jail, for a term not less than ten days; and when the fine is as much as fifty, and not exceeding one hundred dollars, the commitment shall be for the period of thirty days; when as much as an hundred and not exceeding two hundred dollars, the commitment shall be for sixty days, &c; and in all cases, the judgment of the court shall not only direct the imprisonment of the convict for a term certain, but shall also direct his confinement till the fine and costs are paid."

The judgment in the present case is for the fine assessed by the jury, and thirty days imprisonment as a punishment for the offence. This, it is conceded, is regular, but it is insisted that the term of imprisonment inflicted by the statute for the non-payment of the fine, was not imposed by the court, and the defendant is directed to remain in custody until the fine and costs are paid. The defendant cannot object to the regularity of the judgment; for instead of injuriously affecting his legal rights, it is certainly more beneficial to him than the law authorises. For the non-payment of the fine he should have been imprisoned sixty days; but the judgment omits this infliction, and merely directs him to continue in custody until the fine and costs are paid, a punishment from which he may release himself by taking the insolvent oath, under "the rules and restrictions applicable to other debtors." [See act of 1821, Aik. Dig. 230.]

The omission of the circuit court to inflict all the punishment required by law, has not prejudiced the defendant, and as it is not allowable for one to insist upon an error in his favor, he cannot avail himself of it; consequently the judgment must be affirmed.

CLAY, J. not sitting.

ADM'RS OF ALEXANDER v. THE BRANCH BANK AT MONTGOMERY.

1. The Branch Bank at Montgomery cannot obtain judgment against the representatives of a deceased maker of a promissory note, &c., on motion. It is a summary remedy given by statute, which cannot be extended by construction.
2. The deposition of a practising physician, under the act of January 28, 1840, or of a witness residing out of the State, may be taken, either by way of interrogatory or otherwise, as the party desiring the testimony may elect.

ERROR to the County Court of Montgomery.

CLAY, J.—It appears by the record, that this case commenced by a notice of the President of the Branch Bank at Montgomery against the plaintiffs in error, as administrators of Edmund Alexander, deceased, who, in his life time, together with Dela Durden and Thomas Durden, (who are not sued in this case,) made a promissory note for fifteen hundred dollars, payable to the cashier of said Branch Bank, and negotiable and payable at said Branch Bank. The notice is in the usual form, and having been duly executed on the several parties, they relied on the plea of *non est factum*, which being found against them by a jury, judgment was rendered for the amount of the debt, interest and costs. To reverse that judgment, this writ of error is prosecuted, and the plaintiffs now assign the following errors:

1. That being administrators, they were not liable to be proceeded against by the bank, on motion.

2. Because the testimony of Dr. Edmund Fowler, should not have been read to the jury, for the reasons assigned in the bill of exceptions.

1st. In regard to the first assignment of errors, the question was settled by the opinion of the court, at the present term, in the case of the administrators of John Murphy, deceased, and others v. The Branch Bank at Mobile. The court then held, that the remedy, by motion, being a summary proceeding, unknown to the common law, and given by the statute which created the institution, must be strictly pursued, and that the statute, only authorizing such remedy against the "*maker* or *endorser* of any note, bill, or bond

expressly made payable and negotiable at said branch bank," could not be extended, by construction, to the representatives of a deceased debtor. By recurring to the corresponding provision in the law establishing the Branch Bank at Montgomery. [Aik. Dig. 72, § 8,] they will be found to be literally the same, so far as this point is involved; consequently, there is error in the judgment of the court, in the case now presented.

2d. Such being the opinion of the court on the first assignment of errors, it would not be indispensable to notice the *second*, on this occasion; nor should we do so, except that the question it presents, is likely to arise frequently in the future practice of the courts below. This assignment objects to the opinion of the court below, admitting the deposition of Dr. Edmund Fowler, and to sustain the objection, relies on the reasons assigned in the bill of exceptions. On looking to the bill of exceptions, we find the only ground relied on to exclude the deposition, was *that it was taken by interrogatories.* The act of January 28, 1840, [Meek's Sup. 88,] which authorises depositions of practising physicians, as well as those of certain public officers to be taken, declares it may be done "*in the same way and manner*, and on like notice, as now provided for the taking of depositions of *witnesses residing without the limits of this State.*" The law referred to, in the latter clause of this provision, is the 11th sec. of the act of 1807, [Aik. Dig. Depositions, sec. 1,] which authorises the depositions of persons residing out of the State, to be taken, generally, and without declaring whether the depositions shall be taken by interrogatory or otherwise. The 12th section of the same act [Ibid,] provides in like manner for taking the depositions of witnesses about to leave the State. The 13th sec. of the same act, [Ibid,] provides that "either party, wishing to improve the testimony of witnesses, absent from the State, may take the same by interrogatories, &c."

The only case heretofore decided by this court, which seems to have rendered it necessary to consider this question is, that of Glover v. Millings, [2 Stewart & Porter, 28.] In that case, the deposition of a witness, who resided in the State of Vermont, had been taken in the usual manner, and it was objected, that "it could only have been done in the manner prescribed for taking testimony by interrogatories." The witness in that case, resided out of the State; the depositions of practising physicians are re-

quired to be taken in the same manner, required for taking those of witnesses residing out of the State. In the case cited, it appears, it was insisted upon as error, that the deposition had *not* been taken in the manner in which the one now under consideration was taken, and the taking which, by way of interrogatory, is now assigned for error. As a point of practice, therefore, it is well it should be settled.

In the case of Glover v. Millings, before cited, the court seems to have regarded the construction of the several sections of the act of 1807, which have been adverted to, as not very clear and satisfactory, and concludes the question by remarking, "until the Legislature will establish a more certain and uniform method, that the party, seeking such testimony, is at liberty to elect either course." This was safe ground, upon which to leave a question, upon which such contradictory opinions were entertained. The mode of taking depositions was of less importance than that the practice should be placed on a footing, least likely to endanger the interest or safety of parties. Hence, we do not conceive there was error in the opinion of the court below, overruling the objection to the deposition of the witness.

But, on the first assignment of errors, let the judgment be reversed.

O'DONNELL, ET ALS. v. SWEENEY.

1. A contract founded on an act prohibited by statute is void, therefore, a note executed upon the purchase of a horse by the vendee, on Sunday, cannot be enforced by the vendor, in a court of justice.

ERROR to the Circuit Court of Macon.

Assumpsit on a promissory note by the defendant against the plaintiffs in error.

The defendants below pleaded *non-assumpsit*, and a special

plea, that the note was executed on the first day of the week, commonly called Sunday, in consideration of a horse sold by the plaintiff, on that day to the defendants, in the regular course and prosecution of the plaintiff's trade and occupation, &c. To this plea, the plaintiff demurred, and the court sustained the demurrer. Judgment being rendered for the plaintiff, the defendants prosecute this writ, and assign for error, the judgment of the court upon the demurrer.

Billingslea, for the plaintiffs in error, cited Aik. Dig. 440; 1 Root's Rep. 474; Chitty on Con. 248; Com. on Con. 59; 5 Porter 75; 1 Taunton, 130; 2 Porter, 530; 10 Mass. 312.

Belser, *contra*, cited 3 B. & C. 232; 7 ib. 596; 13 Wend. 429; 1 Root 474; 10 Mass. 312.

ORMOND, J.—It is a settled principle of the common law, that all contracts which are founded on an act prohibited by a statute under a penalty, are void, although not expressly declared to be so. [Wilson v. Spencer, 1 Rand. 76; Comyn on Con. 26; Collins v. Blanton, 2 Wilson, 341; Drury v. Defontaine, 1 Taun. 135.] It would indeed be a strange anomaly if a contract, made in violation of a statute, and prohibited by a penalty, could be enforced in the courts of the same country whose laws are thus trampled on and set at defiance.

The statute violated in the making of the contract here sought to be enforced, is to the following effect: "No wordly business or employment, ordinary or servile work, (works of necessity or charity excepted,) nor shooting, sporting, hunting, gaming, racing, fidling, or other music for the sake of merriment, nor any kind of playing, sports, pastimes, or diversions, shall be done, performed or practised by any person, or persons within this territory on the christian sabbath, or first day of the week, commonly called Sunday, and every person being of the age of 14 years or upwards, offending in the premises, shall for every such offence forfeit and pay the sum of two dollars; and no merchant, or shop-keeper, or other person shall keep open store or dispose of any wares, or merchandize, goods, or chattels, on the first day of the week, commonly called Sunday, or sell or barter the same, upon pain of forfeiting the sum of twenty dollars for every such offence" &c. [Aik. Dig. 439.]

It was contended in argument, by the counsel for the defendant in error, that the design of the Legislature was to prevent public sales of goods or chattels, and had no reference to mere private contracts, which have no tendency to violate the order and solemnity of the day. We do not think the design of the Legislature in the passage of the act can be doubted. It was evidently to promote morality and advance the interests of religion, by prohibiting all persons from engaging in their common and ordinary avocations of business, or employment, on Sunday, unless impelled thereto by necessity, or engaged in acts of charity. So far, the law has respect to labor or business which may be either public or private, but it also provides for the higher offence of not only desecrating the christian sabbath, but also of violating public decency by an open traffic.

By the 29th Charles 1, c. 7, it was declared that no tradesman, artificer, workman, laborer or other person whatsoever, shall do, or exercise any worldly labor, business or work of their ordinary callings upon the Lord's day, works of necessity and charity only excepted. In the exposition of this statute it has been held, that a contract would not be void, unless one of the parties was in the exercise of his *ordinary* calling. That was the decision in Drury v. De La Fontaine, [1 Taunton, 135.] This was affirmed in the case of Fennell v. Ridler, [5 B. & C. 406,] where in a most able opinion of Mr. Justice Bayley, it was held "that every species of labor, business or work, whether public or private in the ordinary calling of a tradesman, artificer, workman, laborer or other person, is within the prohibition of the statute. That was the case of the purchase of a horse, by a horse dealer on Sunday; the sale was in private and the action was upon the warranty, and the court held, that it could not be maintained.

This decision was approved by the court of Common Pleas, in Smith v. Sparrow, [4 Bingham 84,] where it was held that a contract entered into privately on a Sunday, was void, although made by an agent, and although the objection was taken by the party at whose request the contract was entered into.

The facts of this case as set out in the plea, are, that the note was executed on Sunday, in consideration of the sale of a horse by the plaintiff to the defendants, and that the plaintiff in making the sale, was in the exercise of his business, trade or occupation. If then our statute was identical with the English, the authori-

ties cited, are full to the point, that this action cannot be maintained. There is however, a broad distinction between them. To constitute an offence against 29 Charles I, one of the parties to the contract at least, must be engaged in his "ordinary calling;" not so under our law, which prohibits all "worldly business or employment, ordinary or servile work, works of necessity or charity only excepted." The term "ordinary" in our statute is equivalent to *common* or *usual* work or employment, and beyond all doubt, embraces within its ample range, the sale of a horse, a negro, or any other chattel, whether the sale be public or private; whether the parties engaged in it, or either of them, were in the prosecution of their ordinary employment or not. It is worldly "business or employment," and falls within the letter, as well as within the mischief of the statute.

But if the contract in this case did not fall within the first branch of the statute, it is fully embraced in the second, which prohibits any merchant, shop-keeper or *other person* from disposing of any wares or merchandize, goods or *chattels*, on the first day of the week.

The contract being such an one as it was unlawful to make on Sunday, cannot be enforced in a court of justice, and the demurrer to the plea should therefore have been overruled.

Let the judgment be reversed and the cause remanded.

ELLIOTT v. CLEMENTS.

1. In a summary proceeding under the act of 1821, at the suit of a surety against his principal, to recover back money paid on a judgment, the record must show in which court the judgment against the surety was rendered.

Writ of error to the County Court of Tuskaloosa.

The judgment sought to be reversed, is as follows:

"Alsey Clements
vs.
William S. Elliott." } July 26th, 1841.

This day came the plaintiff, Alsey Clements, by his attorneys, and it appearing to the satisfaction of the court that the defendant had received legal notice, and it also appearing to the satisfaction of the court, that the plaintiff had paid as security for the defendant the sum of three hundred and six dollars and 52-100, for which a judgment was rendered against the defendant (principal) and the plaintiff, (security;) and it further appearing to the satisfaction of the court, that the interest which has accrued upon the aforesaid sum since the payment thereof by the plaintiff, is the sum of thirty-four dollars and sixty-three cents. It is therefore considered by the court that the plaintiff recover of the defendant the sum of three hundred and forty-one dollars and fifteen cents, and his costs by him about his motion in this behalf expended, &c."

Wm. Cochran, for the plaintiff in error. The record does not shew how and for what length of time before the motion was made, the notice was given; how the defendant in error became a security, and when, and in what court the judgment was rendered, which it is said he paid: nor does it appear in whose favor the judgment was rendered, and when paid. [Aik. Dig. 384, sec. 3; Brown v. Wheeler, 3 Ala. Rep. N. S. 287.] If it were allowable to aid the judgment by a reference to the notice sent up with the transcript, it would then be contended that the notice itself was defective.

Peck, for the defendant in error. The judgment should not be tested by such rigid rules as the plaintiff in error contends for; but as the proceeding was in favor of a surety to reimburse himself money advanced for his principal, it should be liberally expounded. But if the judgment is defective, it may be assisted by the notice, which is believed to be sufficient for all legal purposes.

COLLIER, C. J.—This proceeding is doubtless intended to conform to the act of 1821, "supplementary to an act entitled an act for the relief of securities." [Aik. Dig. 384.] Without reciting that statute at length, it is enough for the present case to say,

that it authorizes sureties who have paid money for their principals on judgment or execution, to move the court in which the judgment was rendered, for a judgment for the amount paid, with interest thereon.

It is unnecessary to consider all the exceptions which have been taken by the plaintiff in error to the judgment entry. It is clear that its defects are such as will not allow us to sustain it. Brown, et al. v. Wheeler, [3 Ala. Rep. N. S. 287,] was a proceeding under the statute referred to, and among other causes it was adjudged to be erroneous, because the time when the surety paid the judgment was not stated, so as to show whether the interest was properly computed.

But in the case at bar there is a more palpable defect in the judgment; it does not recite, that the judgment which was satisfied by the surety was rendered by the court in which this proceeding was instituted. This, it was intimated, was essential in Brown, et al. v. Wheeler. And, as in a case of this character, nothing can be intended beyond what is shown by the record, we think the defect is a fatal error.

If it appeared, that the notice found in the transcript was received and acted on by the county court, we might perhaps refer to it, to aid the judgment. [Jordan, ex'r, et al. v. The Branch Bank at Huntsville, at January, 1843.] But the judgment entry does not show that the notice was before the court, and the case must be decided without regarding it as a part of the record.

Without inquiring whether there are other errors than those noticed, the judgment is reversed, and the cause remanded.

CLAY, J. not sitting.

ROBINSON & WIFE, ET ALS. v. STEELE, ADM'R, &C.

1. When an executor, administrator, or guardian wishes his account settled, he must first present it to the judge of the orphans' court, with his vouchers; it must then be examined, or audited, and stated for allowance: forty days' notice of the term, at which it will be reported for allowance, must then be given, that all persons interested may examine the account, thus stated, and be prepared to contest it.
2. Those pre-requisites, to a settlement of such accounts, must appear, by the record, to have been complied with.

ERROR to the County Court of Autauga.

WILLIAMS, for plaintiffs in error.

CLAY, J.—The object of the writ of error, in this case, is to reverse the decree and proceedings of the county [orphans'] court, upon the settlement of the account of the defendant in error, as administrator of the goods and chattels, rights and credits of Jeremiah Smith, deceased. The plaintiffs assigned for error, that the court erred,

1. In auditing and settling the accounts of the defendant on the same day, to-wit, the 7th September, 1842.

2. Because the accounts of the defendant were audited and allowed, without giving forty days' notice to the plaintiffs, or any one else.

3. Because the accounts of the defendant were ordered to be audited on the 5th Monday in August, 1840, but were not so audited until the 7th of September, 1842, and then audited without notice to the plaintiffs.

There are several other assignments, not deemed material to be noticed. Those just stated, however, appear to be fully sustained by the record, and either of them is fatal to the decree, rendered in the court below.

By the record, it appears, that, on the 9th July, 1840, "on motion of John Steele, administrator of the estate of Jeremiah Smith, deceased, for final settlement of said estate—ordered, that he file his account current and vouchers on or before the fifth Monday

in August next, in this office, and that publication be made in the Montgomery Advertiser, for forty days, notifying all persons interested in said settlement, to appear here on said day, to show cause if any, why said account current and vouchers should not be allowed."

The law provides, that the judge of the orphans' court may "take, receive, and audit all accounts of executors, administrators, and guardians;" and that the said judge, "*after auditing such accounts and causing them to be properly stated*, shall report the same for allowance to the next term of the orphans' court, &c." [Aik. Dig. 182, § 27]—and further makes it the duty of the judge to give at least forty days' notice of the intention of such executor, administrator, or guardian, to have "such account presented at said court, for allowance at such term, &c." [Aik. Dig. 252, § 33.]

The record does not show that any of these preliminaries to a final settlement, have been properly performed. As laid down in the case of the Legatees of Horn v. Grayson, [7 Porter, 272–3,] "if an executor or administrator wishes to settle his accounts, this law makes it his duty to present his vouchers to the judge of the county court, whose duty it is to hear, examine, and state them, and report them for allowance. It is then made the duty of the judge to cause notice, or advertisement to be given, in the mode prescribed in the act, at least forty days previous to any further action on the account. The object of the law is manifest. The account is to be stated—that all persons interested may examine it, and prepare, if necessary, to contest it. As the county court is one of special and of limited jurisdiction, it is necessary that the record should show that the requisitions of the act have been complied with, unless they are dispensed with by the appearance of the parties."

This is certainly a clear and sound exposition of the provisions of the act, and of the reasons, on which they are founded. None of these requisitions seem to have been complied with, in the case at bar. When the order for publication of notice was made, it does not appear that the accounts and vouchers of the administrator, had been filed—of course, they had not been *audited*, *examined*, nor *stated*. The accounts and vouchers were only ordered to be filed, on or before the day appointed for their allowance; hence, there was no opportunity for any one interested to

examine, or prepare to contest them. Nor does it appear by the record, as it should, that any publication of notice was made, even as required by the imperfect order, entered for that purpose.

Furthermore, the order of publication appointed the 5th Monday in August, ensuing, for those interested to appear, and show cause, why the accounts and vouchers of the administrator should not be allowed. The record does not shew that any step whatever was taken in the settlement on the day appointed—nor does any continuance appear to have been entered then, or on any subsequent day. There does not seem to have been an appearance of any party interested, at any time—and, without any other publication of notice, on the 7th September, 1842, more than two years afterwards, it is merely "ordered that the report and final settlement by John Steele, as administrator of the estate of Jeremiah Smith, deceased, be received," and that it be recorded, and filed as an office paper. [See the case of Douthitt's adm'r v. Douthitt, 1 Ala. Rep. N. S. 594, where the case cited from 7th Porter, is referred to and recognized.]

Let the decree of the orphans' court be reversed, and the case remanded.

YOUNG v. SCOTT, ADM'R.

1. An action of debt will not lie on a promise under seal to pay a sum of money in current bank notes.

ERROR to the Circuit Court of Benton.

Debt by the plaintiff as assignee of John Twitty, against the defendant in error.

The declaration contains two counts, in both of which the instrument sued on is declared upon as a sealed instrument, executed by one Dunlap Scott, for the payment to John Twitty, on the

23d of October, 1826, of one thousand dollars, in current bank notes. Profert is made of the deed, and an allegation that it was assigned to the plaintiff.

The second count is the same as the first, with the addition, that the writing obligatory sued on, is alleged to be a sealed instrument by the laws of the State of North Carolina, where it was made and executed.

The defendant craved oyer of the instrument sued on, and demurred to each count in short, by consent. The instrument was not set out on oyer. The court sustained the demurrer, and rendered judgment for the defendant.

The plaintiff assigns for error, the judgment of the court on the demurrer.

Moore, for plaintiff in error cited, 1 Chitty's Pleading, 417, 660.

Rice, *contra*, cited 1 Stewart, 579; 1 S. & P. 244; 2 ib. 128; 2 Ala. Rep. 397; Story's Con. of Law, 467, 475.

ORMOND, J.—One question which it appears was intended to be presented is not raised upon the record. It appears from the declaration that the instrument sued on, is a writing obligatory. The plea appears to have been designed to question this, but as the instrument is not set out on *oyer*, it is impossible for this court to say whether it is a bond or simple contract; this point therefore, is not in a condition to be considered in this court.

The other question is, whether debt will lie upon a bond promissing to pay "one thousand dollars in current bank notes."

There has been some contrariety of decision as to the legal effect of a note payable in the notes of chartered banks. In New York, it has been held that such a note is negotiable. [Keith v. Jones, 9 Johns. Rep. 120; Judah v. Harris, 19 ib. 144.] In Ohio, South Carolina and Pennsylvania, a different doctrine prevails. [McCormick v. Trotter, 10 S. & R. 94; Linge v. Kohne. 1 McCord, 115; McClain v. Nesbit, 2 Nott & McCord, 519.]

So also in Kentucky, it has been held that such a note will not sustain an action of debt. [Campbell v. Wister, 1 Litt. Rep. 30.]

In this State, at an early period of this court, it was held that

debt would not lie on a promise under seal, to pay a sum certain in current bank notes. [Jackson v. Waddill, 1 Stewart 579.] This decision has been acquiesced in since that time, and ought not to be disturbed, unless it is clearly wrong. It is one of the highest duties of courts of justice, to give effect to contracts as the parties understand them at the time they were made, if not contrary to law, and we cannot doubt that in all such cases as the present, the debtor expects to pay, and the creditor to receive, bank notes of the numerical amount of the obligation in its discharge. In such a case, to compel the debtor to pay in the precious metals the same amount in dollars, which he promised to pay in bank notes, would be doing him the greatest injustice, and would be in effect, to change the contract to his prejudice.

It has been sometimes said, that bank notes are *quasi money*, but we are painfully admonished at the present time, that bank notes have but few of the attributes of coin; being unstable and fluctuating in their value, they cannot, in any just sense, be considered money, and therefore, upon such a note an action of debt cannot be maintained. The measure of damages for a breach of the contract not being the sum in *numero*, which the obligation calls for, but the value of the bank notes in coin at the time the payment is to be made.

Let the judgment be affirmed.

THE STATE v. FLANIGIN.

1. An indictment for murder, framed as at common law and concluding against the form of the statute, will warrant the conviction under the fifth section of the third chapter of the "Penal Code," of a person, who shall, with malice aforethought, cause the death of a slave, by cruel, barbarous, or inhuman whipping, &c.; or under the sixth section, of an *overseer or manager*, who shall cause the death of a slave by barbarous or inhuman whipping, or beating, &c.
2. Where a charge given to the jury in a criminal case, is not expressed in terms strictly appropriate; yet if it is not opposed to law, and can not be supposed to have misled them, it will not be considered an error for which the judgment consequent upon a verdict of guilty should be reversed.

3. The jury were informed that if they found the accused guilty of one grade of an offence, the punishment which the law required the court to inflict, was imprisonment in the Penitentiary for a period not less than two, nor more than ten years:—*Held*, that although ten years was the shortest period for which the court was authorised to imprison in such cases, yet the error was not fatal to the judgment, as it could not have influenced the jury in the performance of their duties.

The prisoner was indicted in the circuit court of Jackson, for the murder of a negro man, a slave, named Jacob. The indictment contains four counts drawn in the usual form, all alleging the death to have been occasioned by whipping and striking; in the first, the slave is alleged to have been the property of Joel H. Chambless; in the second, of persons unknown; in the third, of a person unknown; and in the fourth of Joel H. Chambless as trustee for Salina Glascock and her children.

It is stated in a paper purporting to be a bill of exceptions, that all the evidence adduced on the trial, which was deemed material, is set-out therein. Without attempting to recite the facts with particularity, it may be enough to say, they shew, that the prisoner was an overseer of Robert Freeman, on his plantation in Jackson county; that the slave Jacob lived with Freeman; that the prisoner was seen on the evening of the slave's death, to whip him and strike him about the head with the handle of the whip, and a short time afterwards he was found dead, near where the prisoner was last seen to strike him. A physician, who made a *post mortem* examination of the body of Jacob, stated, that it gave evidence that many blows and stripes had been inflicted with great violence; all of which together, he thought sufficient to cause his death.

The Judge, in his charge to the jury, among other things, referred to sections five and six of the chapter "of offences against the persons of individuals," contained in the penal code. He instructed the jury, that the offence charged against the defendant in the bill of indictment, was embraced by those sections, and they might find the defendant guilty of murder in the first degree under the fifth section, in which event, they might, in their discretion, inflict upon him the punishment of death, or confinement in the penitentiary for life; or they might find the defendant guilty of murder in the second degree, under the sixth section; in which last event, it would be in the discretion of the court, and not of

the jury, to determine the punishment, *which would not be less than two, nor more than ten years.*

The jury found the prisoner guilty of murder in the second degree, and he was thereupon sentenced by the court to ten years imprisonment in the penitentiary; and thereupon the questions of law arising upon the charge of the circuit judge to the jury, have been referred to this court for its decision, as novel and difficult.

S. PARSONS, for the prisoner. The court should not have instructed the jury, that they might find the prisoner guilty, either under the fifth or sixth section of the law referred to in the charge. It was calculated to mislead the jury by inducing them to believe that the court thought him guilty of the former, but would be satisfied, if he was found guilty of the latter offence. *Again;* by saying that the punishment inflicted, if guilty, under the sixth section, was from two to ten years, instead of not less than ten years imprisonment in the penitentiary, the jury may have been less cautious in scaning the evidence, and found the prisoner guilty upon less satisfactory proof than they would otherwise have required.

The sixth section applies to the case of an overseer who inflicts such punishment upon a slave, under his direction, as to cause death. Although the prisoner was an overseer, yet not being indicted under that section, he cannot be found guilty of the offence it denounces. Nor can an overseer be punished under that section, where he kills a slave by excessive punishment, where there was *any cause* for the infliction of chastisement.

The sixth section *expressly* excepts from its sanction, such as kill in self-defence, yet a reasonable construction would make other exceptions, and the most convenient decision would be to hold where there is any cause for the homicide, it does not apply to such a case—leaving all such cases to be proceeded against under the old law. [1 Blacks. Com. 41, 61, 88.]

The proof is insufficient, and is variant from the indictment in respect to the ownership of the slave who was killed.

ATTORNEY GENERAL, for the State.

COLLIER, C. J.—The counsel for the prisoner has made several points, but we think the charge of the court excepted to,

and which has been referred to this court for revision, raises only one question. We are not to inquire into the sufficiency of the evidence to warrant the conviction, nor are we to speculate about the correctness of the other instructions to the jury, of which the bill of exceptions does not inform us. The single question is, will an indictment for murder, framed as at common law, but concluding against the form of the statute, warrant a conviction for the offences described in the fifth and sixth sections of chapter third, of what is called the *Penal code.*

The first and second sections of that chapter, distinquish between murder in the first, and murder in the second degree, and declare the constituents of each grade of the offence, and provide that the first shall be punished with death, or imprisonment for life in the penitentiary, at the discretion of the jury; the latter is punishable by imprisonment in the penitentiary, for a period not less than ten years. The fifth and sixth sections are as follows: "5. If any person shall with malice aforethought, cause the death of a slave by cruel, barbarous or inhuman whipping or beating, or by any cruel or inhuman treatment, or by the use of any instrument in its nature calculated to produce death, such killing shall be deemed murder in the first degree." "6. If any person being the overseer or manager of any slave or slaves, or having the right to correct such slave or slaves, shall cause the death of the slave by such barbarous or inhuman whipping or beating, or by any other cruel or inhuman treatment, although without intention to kill, or shall cause the death of any such slave or slaves by the use of an instrument in its nature calculated to produce death, though without intention to kill, unless in self-defence, such killing shall be deemed murder in the second degree."

Where a statute is introductive of a new offence, or an offence at common law, is made a crime of a higher nature, as where a misdemeanor is made a felony; or where a common law offence is made subject to an additional punishment, the indictment in either of these cases should be drawn in reference to the statute creating or changing the nature of the offence; but if the statute is only declaratory of what was previously an offence at common law, without adding to, or altering the punishment, the indictment need not conclude against the form of the statute. [1 Chit. Crim. L. 290; Russell v. Commonwealth, 7 Serg. & R. Rep. 484; Commonwealth v. Searll, 2 Binn. Rep. 339.] In The People v.

Guoch, [13 Wend. 159,] the prisoner was convicted of murder for an offence committed subsequent to the revised statutes of New York, upon an indictment framed according to the form usual in practice previous to the revision; the cause was removed both to the Supreme court and Court of Errors, and affirmed by the unanimous opinion of each court. The question was, whether the revised statutes in which the crime of murder is attempted to be defined and declared, made it necessary to change the common law form of the indictment for an offence of that description. The revised statutes provide, that the killing of a human being, unless it be manslaughter, &c., as afterwards prescribed, shall be murder in the following cases, namely: 1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being. 2. When perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. 3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony." Both the Supreme court and the Court of Errors, were of opinion, that the modification of the law, did not require the form of the indictment to be changed. It was observed by the latter, that "such changes in the law of murder have often occurred, both in this country and England; yet it never has before been thought necessary to change the common law form of the indictment to meet cases of this description. The court and jury in such cases, immediately apply the common law principle, and the killing is adjudged to be murder or manslaughter, according to the nature and quality of the crime that the offender was perpetrating at the time the homicide was committed." And further, "a defendant cannot be convicted on such an indictment, of a felonious homicide, with malice aforethought, unless the evidence is such as to bring the case within the statutory definition of murder."

In the case of the State v. Guy Rains, [3 McC. Rep. 543,] the prisoner was indicted under the statute of South Carolina, to increase the punishment inflicted on persons convicted of murdering slaves; that statute provides, that if any person shall thereafter wilfully, maliciously and deliberately, murder any slave within the State, such person, on conviction, shall suffer death without benefit of clergy. The indictment pursued the words of the sta-

tute, and concluded *contra formam statuti*, but was held to be insufficient. The Judge who delivered the opinion remarked, that the offence should have been charged in the indictment as at common law; and that all the essential parts of the common law indictment should have been pursued. So, in Fuller v. The State, [1 Blackf. Rep. 65,] it was held, that although a statute declare the constituents of murder, and prescribe the punishment substantially as at common law, though not in the words of the common law indictment for that offence, yet an indictment as at common law was sufficient. [See also Jerry v. The State, Id. 396, and 1 Virginia Cases 310; 6 Binn. Rep. 179.]

We will not stop to make a particular application of the law as laid down in the citations made to the case at bar, as we have several statutory provisions which are decisive of the question we are considering. By the 12th section of the 8th chapter of the act "regulating punishments under the penitentiary system," it is enacted, that "upon an indictment for any offence, consisting of different degrees, as prescribed by law, the jury may find the accused not guilty of the offence in the degree charged in the indictment, and may find him guilty of any degree of such offence inferior to that charged in the indictment, or of an attempt to commit such an offence; and whenever a person is indicted for an offence embracing one or more offences of a lesser character, if the guilt of the accused is not made out as charged, it shall be competent for the jury, if the proof authorizes it, to find the accused guilty of the lesser offence, whether a felony or a misdemeanor." Again, by the 26th section of the same chapter, "all indictments for offences inhibited by this code, which are offences at common law, shall be good, if the offence be charged or described according to the common law; and the party charged, on conviction, shall receive the punishment prescribed by this act, nor shall the words 'force and arms,' or 'contrary to the form of the statute,' be regarded as necessary in any indictment whatever, &c."

The offence of which the prisoner has been convicted, would at common law be either a homicide with malice implied, or it would be manslaughter; one or the other of these offences it would be, and nothing less; and on an indictment for murder in the usual form, it would have been competent to have convicted him of either of these offences according as the proof might warrant.

This being the case, the decisions we have cited show, that the indictment embraced both the grades of murder provided for by the fifth and sixth sections, and that the charge of the circuit judge was correct. But if the common law rule were otherwise, the sections of our statute cited from the eighth chapter, are perfectly conclusive to show, that the indictment is sufficient to sustain the conviction.

The jury could not have been misled by the charge of the court, informing them that they might find the prisoner guilty, under either the fifth or sixth section. At least such must be the inference from the bill of exceptions, which only professes to set out a part of the charge. We cannot infer that the court intended to decide for the jury the question of the prisoner's guilt; but must suppose in the posture in which the case is presented, that, that question was fairly referred to the jury. Nor can we understand that the judge intimated his opinion, that the prisoner was guilty under the fifth section; and if he did, the prisoner has not been prejudiced, if guilty under the sixth section.

It was the duty of the jury to try the prisoner according to the law and evidence, and he could not have been prejudiced by the remark, that the punishment for the offence denounced by the sixth section, was not less than two, nor more than ten years imprisonment in the penitentiary. The length of imprisonment could not change the grade of the offence, or the guides by which truth is discovered. The investigations of the jury should have been alike cautious and impartial, whether the imprisonment was one or twenty years.

Our conclusion is, that the judgment of the circuit court of Jackson, so far as referred to us for revision, is free from error; and it is consequently affirmed.

CLAY, J.—Not sitting.

JOHNS & COLE v. FIELD.

1. A garnishee cannot plead in bar of a recovery, in a suit brought against him by the assignee of a promissory note, that judgment *nisi* has been rendered against him as the debtor of the payee, and that he has paid the same—there not appearing to have been any *sci. fa.* issued, or served on him, nor any final judgment against him.

ERROR to the Circuit Court of Barbour.

This was an action of assumpsit, brought by George Field against Johns & Cole, as makers of a promissory note for one thousand dollars, payable to one Abram K. Allison, by whom it was endorsed to said Field. The declaration was in the usual form, by the endorsee against the makers.

The defendants filed several pleas, only one of which requires any notice. That plea (being the 5th) sets forth, in substance, that Hart & Bosworth, at July term of the county court of said county, in 1839, in their certain action, in said court, recovered judgment against said Allison, the payee of the promissory note sued on in this case, for $931, besides costs, which judgment is still in force, &c.—that, afterwards, before the institution of this suit, and before the defendants (below) or either of them had notice of the assignment of said note, one of the defendants, Johns, was garnisheed before said county court, in said cause of Hart & Bosworth against Allison; that said matter of garnishment was transferred to the circuit court of said county; that afterwards, before the commencement of this suit, and before either of said defendants had notice of said endorsement of said note, judgment *nisi* was rendered against said defendant Johns, for the said sum of $931, on account of his supposed indebtedness to said Allison, the payee of said note—which judgment *nisi* is still in force, &c.—and that afterwards, before the commencement of this suit, and before said defendants or either of them had notice of said endorsement of said note, the said defendant Johns paid off to said Hart & Bosworth, and wholly satisfied said judgment *nisi* for said sum of $931.

This plea was demurred to by the plaintiff, and issue taken on the others. The court sustained the demurrer to said 5th plea—there was a verdict for the plaintiff on the issues joined on the others, and judgment rendered thereon.

To reverse that judgment this writ of error is prosecuted, and the only assignment of error is, that the court erred in sustaining the demurrer.

BUFORD, for plaintiff in error.
BELSER & WILEY, *contra.*

CLAY, J.—The question presented by this record is, whether the judgment *nisi*, set forth in the 5th plea, and the payment of the money under it, constitute a good bar to the plaintiff's action, as endorsee? It cannot be pretended that this judgment was conclusive; that any action could have been sustained upon it against the garnishee; or that any execution could have issued under it, against him. The course of proceeding required by our statute, in such cases, when the garnishee, summoned in any case fails to appear, is for the court "to enter a conditional judgment against him, upon which a *scire facias* shall issue against such garnishee, returnable to the next term of the court, to show cause why final judgment should not be entered against him; and upon such *scire facias* being duly executed and returned, if such garnishee shall fail to appear, according to the mandate thereof, and discover on oath in manner aforesaid, the court shall confirm said judgment, and award execution for the plaintiff's whole judgment and costs." [See Aik. Dig. 42, § 20.]

The defendant in the present case pleads that judgment *nisi* was rendered against him, at the suit of Hart & Bosworth, at the spring term of the circuit court, 1840, but he does not aver that any further proceedings thereon were ever had; either that the *scire facias*, required by law, was ever issued, or served on him, or that any final judgment was ever rendered against him—although the present action was not commenced against him till afterwards, and, as the declaration was not filed till September term, 1840, he probably did not file his said plea (at all events the case could not have been tried) till the spring term, 1841. If *scire facias* had properly issued against the defendant as garnishee, at the suit of Hart & Bosworth, it should have been re-

turnable at the fall term, 1840—and, if not issued before that time, the proceedings in garnishment were discontinued. The writ in the present case, was served on one of the defendants on the 8th of August, preceding the return day of the *scire facias;* and, consequently, they had notice of the assignment of their promissory note before they could have answered, and before any final judgment could have been rendered against them.

In the case of Colvin v. Rich, [3 Porter, 175,] this court held, that "should the maker of a note, or bond, *with the knowledge, before he made his answer upon a garnishment, that it had been transferred,* acknowledge in his answer, that he owed the debt to the payee, or obligee, he would be as clearly and justly liable to pay the whole amount to the assignee, as he would, after a voluntary payment, with such knowledge, to the payee, or obligor himself."

In the case of Foster v. White, [9 Porter, 224,] the case of Colvin v. Rich was referred to and recognized, and the court said: "It was not only his (the garnishee's) privilege, *but it was a duty imperative on him, at any time before final judgment,* to make known that he had received notice of the transfer of the notes."

The statute protects the rights of the assignee, at least, until the garnishee answers—and, at any time before such answer, he may give notice of the assignment to the maker of the note, and secure himself against the claim of his assignee's creditor. The assignee in such cases has no notice, and is usually absent; and his rights should not be affected by extending the terms of the act, by construction.

These views lead us to the conclusion, that the 5th plea, relied on by the defendants in the court below, was insufficient, and that the demurrer thereto was rightfully sustained.

Judgment affirmed.

ORMOND, J.—(*Dissenting opinion.*) It appears to me that the statute which requires a *scire facias* to issue to the garnishee, after a judgment *nisi* against him, is intended entirely for his benefit, and if so he may certainly waive it, and pay the debt to the plaintiff in attachment, not having received notice that the debt has been transferred to another, and should not be compelled to retain it in his hands, bearing interest, for the purpose, as supposed by the majority of the court, of protecting the right of some un-

known assignee. Indeed, if there had been no judgment *nisi* against him, the payment to the plaintiff in attachment would operate as a transfer of the debt of the plaintiff, and extinguishment of the debt he owed the defendant in attachment, and his condition certainly cannot be worse in consequence of the conditional judgment against him.

THE BRANCH BANK AT DECATUR v. JONES.

1. The act of 1821, authorizing a summary judgment against Banks generally, on failure to redeem their notes on ten days' notice being given of the intended motion, is repugnant to the thirteenth section of the charter of the Branch Bank at Decatur, which requires thirty days' notice of such motion, and is, therefore, as it regards the time of notice, repealed.

ERROR to the Circuit Court of Morgan.

This was a motion by the defendant in error against the Bank, for judgment on notes of the Bank, amounting to twenty-eight hundred dollars.

The record disclosed that thirty days' notice had not elapsed from the time of giving notice of the motion, to the time when the judgment was rendered; which was assigned for error. Many other questions were presented on the record, but as no other assignment of error was noticed by the court, they need not be further stated.

McCLUNG, for plaintiff in error, contended, that the provision of the 13th sec. of the charter of the Bank, giving to the creditors of the Bank the right to the same summary remedy which had been given by the eighth section to the Bank against its debtors, was a repeal of the act of 1821, giving a summary remedy against Banks generally; the former requiring thirty days to be given, and the latter, only ten days notice. That therefore, if it be con-

ceded that the act of 1821 applies to Banks afterwards created, that the two acts are repugnant to each other, and the latter repeals the former *pro tanto*.

S. Parsons, *contra*—Denied that there was any repugnancy between the two acts, but that both might well stand together. He insisted that the reciprocity which the constitution required, and which the thirteenth section of the charter contemplated, did not relate to the details of the remedy—that therefore, all that was required by the thirteenth section of the charter was, that those having claims against the Bank should be permitted to enforce them, by motion, and this was secured by the act of 1821.

As to the construction of statutes, he referred to 6th Porter, 231; 1 B. Com. 90; 19 Viner's Ab. 525; Pl. 132; 9th Cowen, 506.

ORMOND, J.—The principal question in the case is, whether there was sufficient notice of the time of making this motion.—The solution of this question depends on the construction of the two statutes which have been cited. In 1821, an act was passed, giving to the holders of bank notes, a summary remedy, if the note was not paid on presentment, and authorized a judgment by motion against the bank, on ten days' notice to be given, to be executed and returned by the sheriff, making the protest of a notary evidence of the fact of presentment to the bank for payment. [Aik. Dig. 54.]

In 1832, the Branch Bank at Decatur was chartered. By the 8th section of the charter, authority was given to the bank to recover from any one indebted to it, by motion, in the circuit or county court of the county in which the bank is situated, giving *thirty* days notice of the intended motion, upon producing the certificate of its president that the debt is really and *bona fide* the property of the bank. [Aik. Dig. 72.] The 13th section declares "that the remedy for the collection of debts shall be reciprocal for and against the bank," which is a literal transcript from the constitution of this State, under the head of "Establishment of Banks."

We entertain no doubt that the act of 1821, although passed long anterior to the charter of the Decatur Bank, would operate directly on it, so as to give the remedy there provided, to the holders of bills against that bank. So, on the other hand, we think it

equally clear that if the act of 1821 was not in existence, the effect of the 13th section of the charter of the bank would be to give the creditors of the bank the same remedy against the bank, and to be exercised in the same mode which the bank had against its debtors. The question then to be decided is, whether the act of 1821 was repealed by the 13th section of the charter.

It is an established rule in the construction of statutes, that the law does not favor a repeal by implication; that where two statutes are so repugnant to each other that they cannot stand together, the former must yield to the latter, but so far as both may consist together, both will be sustained. [6 Bac. Ab. 373; Kinney v. Mallory, 3 Ala. Rep. 626.]

It is to be observed, that although these statutes were passed at different times, they were both passed on and re-affirmed by the Legislature at the adoption of Mr. Aikin's compilation of the laws; it appears therefore, that the Legislature considered both these enactments in force, or to speak more accurately, we must understand it as a declaration that the Legislature did not understand that they were wholly repugnant to each other, as one of the principal objects of the Digest was to exclude from the authorized statute book all repealed laws.

The only point in which these two statutes are repugnant to each other, is in the length of time which was required to elapse after notice before the court was authorized to render judgment, the first law requiring only ten days, the last thirty days' notice, and as it is impossible that effect should be given to both in this particular, the former must yield to the latter, and is as to the length of notice, repealed.

Although we have observed upon the fact, that the Legislature, by the adoption of Mr. Aikin's Digest, re-affirmed their opinion, that the two acts were not wholly repugnant, yet when laws found on the statute book are repugnant to each other, we know of no other mode of ascertaining which must yield in cases of this kind, but by referring to the dates of their passage. [See 4 Porter, 189.]

It results from this view that the judgment which was rendered before thirty days had elapsed, after the notice, must be reversed, and it therefore becomes unnecessary to consider the other point made in the cause.

GRAY'S ADM'RS v. E. J. & H. WHITE.

1. To a plea that the note on which the action is brought, was not presented to the administrators of the maker, the plaintiff may reply that the debt was contracted out of the State, without denying that the payee resides within the same.
2. The statute which allows a defendant to plead as many several matters as he may judge necessary to his defence, does not authorise the defendant to rejoin two distinct answers to the replication.
3. The general rule which requires a plaintiff in an action *ex contractu* against several, to show the liability of all the defendants, to entitle him to a judgment against a less number, does not apply where the defendants are sued as executors or administrators, upon a contract made with their testator or intestate; in such case, the plaintiff is entitled to a judgment against such of the defendants as may be shown to sustain the character in relation to the estate of the deceased, in which they are charged.

WRIT of error to the County Court of Tuskaloosa.

This was an action of *Assumpsit*, by the defendants in error, against the plaintiffs and Lorenzo L. Sexton, on a promissory note made by a mercantile firm, of which their intestate was a partner, for the payment, twelve months after date, to the order of the Messrs. White, of the sum of four hundred and eight 18-100 dollars, at the U. S. Bank in Mobile.

The defendants below pleaded jointly. 1. That they were not administrators. 2. *Non-assumpsit* by intestate within six years. 3. *Actio non accrevit infra sex annos.* 4. The statute of non-claim; and 5. *Non-assumpsit.* To the first plea, the plaintiffs replied that the defendants were administrators, and concluded to the country; to the second, that suit was brought within six years after letters of administration were granted, &c.; that before the maturity of the note, the intestate died; that on the 30th March, 1835, letters of administration were granted, &c; that suit could not be brought against the administrators within six months, but was brought within the six years next after the lapse of the six months. To the third plea, there was a similar replication; to the fourth, it was replied that the debt was contracted out of the State; and on the fifth issue was joined.

The defendants demurred to the replication to the fourth plea, which being overruled, they filed two rejoinders; but the court, on motion, directed the defendants to strike out one of them, and thereupon they excepted.

On the trial, the defendants excepted to the charge of the court to the jury, which informed them, that they might find in favor of Lorenzo L. Sexton, if the proof showed he was not administrator, and against the other defendants, if the proof authorised it. The jury returned a verdict in favor of Lorenzo L. Sexton, and against the others, and a judgment was rendered accordingly. To revise that judgment, the unsuccessful parties have joined in the prosecution of a writ of error.

PECK, with whom was L. CLARK, for the plaintiffs in error, insisted, that the court erred. 1. In overruling the defendants demurrer to the plaintiffs replication. 2d. In directing one of his rejoinders to be stricken out; and 3d. In the charge to the jury. They cited 1 Saund. Rep. top page, 260, note 7; Bac. Ab. Title Plead. 40, 1; 5 Esp. Rep. 47; 3 Id. 76; 11 Johns. Rep. 113; 20 Id. 106, 122–3.

J. J. PORTER, for defendant. 1. The replication to the plea of the statute of non-claim was good. Sanford, adm'r v. Weeks, 3 Ala. Rep. 369.] 2. Although the defendants may plead several pleas to the declaration, yet it is not allowable to rejoin two distinct matters to the replication. [5. Bac. Ab. Pleas & Plead. K. 3, 447; Gould's Plead. 429; 1 Chit. Plead. 687.] 3. It was competent for the plaintiffs below to recover against such of the defendants as were shown to be administrators, and for the jury to find in favor of the other defendant.

COLLIER, C. J.—1. It is insisted, that the replication to the fourth plea is too limited in its averments; that it is not enough to show that the debt sued on was contracted in another State, but it should go further, and deny that the payee of the note resides here. Such is not the law. The statute which requires the presentation of claims against the estate of a deceased person within eighteen months from the grant of letters testamentary, or of administration, contains an express exception in favor of debts contracted out of the State. Under the influence of that excep-

tion it has been held, that a replication which sets out that the debt in suit was contracted in another State, designating it by name, is entirely sufficient. [Sanford, adm'r v. Wicks, 3 Ala. Rep. 369.] The replication in the case at bar, comes fully up to the requirement of the case cited.

2. The statute of 4 and 5 Ann, chap 16, enacts that the defendant in any action or suit, &c., may, with leave of the court, plead as many several matters thereto, as he shall think necessary for his defence. Our statute upon the subject uses terms not materially different, and provides, that "the defendant in any cause may plead as many several matters as he may judge necessary to his defence." Under the English statute it has been held, that although it is permissible to interpose several pleas to the declaration, the defendant cannot rejoin two several matters to the plaintiff's replication. [Warrant v. Ives, 2 Strange's Rep. 908; 5 Bac. Ab. K. 3, 447.] And such being the settled construction of that enactment, our act which was borrowed from and passed in reference to it, must receive a similar interpretation. Consequently, the direction of the court to strike out one of the defendant's rejoinders to the plaintiff's replication was entirely proper.

3. It is argued for the plaintiff in error, that the general rule, which requires the plaintiff in an action *ex contractu*, to make out his right to recover against all the defendants, in order to a judgment against any, proves the charge of the circuit judge to be erroneous. To the justness of this conclusion we cannot assent, when attempted to be applied to the present case. The defendants are not sought to be charged upon a contract made by themselves, but the declaration sets out a legal liability, made by the intestate and his copartners. An executor or administrator, is in general regarded as a mere trustee for creditors and the legatees, or distributees, and when sued upon a contract entered into by his testator or intestate, *will not be considered* as having promised *in fact*. They succeed to the legal rights of the deceased in such part of his estate as they are entitled to, and must be sued for the recovery of the debts with which he was chargeable. [Grassner v. Eckart, 1 Binn. Rep. 575; Wilson v. Wilson, 9 S. and R. Rep. 428.] And it has been held, that the rule, if one of two persons having a joint cause of action *ex contractu*, sues alone, advantage may be taken under the general issue, does

not apply to a party suing in a representative character, for in the latter case, the non-rejoinder can only be taken advantage of by plea in abatement. [Holmes v. De Camp, 1 Johns. Rep. 34.] In Griffiths v. The ex'rs of Fiestall, [1 Mood. & M. Rep. 146,] two defendants being sued as executor and executrix, pleaded *ne unques executor and executrix*, it being proved that one of them only was an executor, a verdict was claimed for both defendants, or that the plaintiff should be non-suited, under the general rule, that if one defendant be discharged in assumpsit, the other must be also. The court held, that the plaintiff was entitled to a verdict on the counts which lay the promises by the testator. In those counts, the contract is alleged to have been made with the testator, and is proved as laid; the principle does not apply to a plea which does not put the contract in issue, but only goes to the personal discharge of one of the parties. [See also 1 Saund. Rep. 207, note a; 2 Lomax's Ex'rs & Adm'rs, 416.] The result of that case was not influenced by the fact that the defendants were sued as executors, instead of administrators. It is alike applicable in its reasoning to each description of representatives, and ascertains the law correctly.

It follows from what has been said, that the judgment of the county court must be affirmed.

THE KEMPER AND NOXUBEE NAVIGATION AND REAL ESTATE BANKING COMPANY v. SCHIEFFELIN & CO.

1. The holder of notes, or bills upon an unchartered banking association, may maintain an action against the members of the same in his own name—although such notes or bills are drawn payable to A B, or bearer, and have not been endorsed.
2. Although no issue of fact appears in the record, if the parties appear, and submit the cause to a jury, the want of an issue will be considered waived.

ERROR to the County Court of Sumter.

This was an action of assumpsit, brought by the defendants in error, in the County court of Sumter, to recover of the plaintiffs in error the amount of nine bills, or notes, issued by the agents of said banking company, as president and cashier, payable, respectively, to different individuals, *by name* or *to bearer*. The defendants in error sued and declared *as holders* of said several bills, which they averred were put in circulation, to answer the purposes of money; that the company was an unchartered banking association; and that said bills had been presented at the office of said banking company, in the city of Mobile—the place of payment specified in each—and payment demanded, but that neither the defendants, nor any one of them, nor any one else for them, would, or did pay the same, but refused to do so.

The defendants demurred to all the counts, except the common counts, generally, and severally—in short, by consent; and the demurrers were overruled by the court. No pleas appear upon the record; but it states, "This day came the parties, by their attorneys, and, also, came a jury of good and lawful men, &c., who being elected, tried, and sworn, the truth to speak upon the issue joined between the parties, &c." and they returned a verdict in favor of the plaintiffs; a judgment was rendered thereon; to reverse which this writ of error is prosecuted.

The errors assigned, are,

1. Because the court below overruled the several demurrers filed.

2. Because the finding of the jury was upon an issue of law, instead of fact.

Bliss & Baldwin, for plaintiffs in error.

Steele & Metcalfe, *contra*.

CLAY, J.—The first and most important question, presented by the record, for the consideration of the court, is whether the action is maintainable by the plaintiffs below, *as holders* of the several notes described in the declaration. The counsel for the plaintiffs in error contend, the action cannot be maintained by the defendants in error, in their own names, as holders, merely—and rely upon the first section of "an act to prevent the institution of illegal and oppressive suits in the United States' courts, in this State"—approved, June 30th, 1837. [Meek's Sup. 108, § 1.]

The section referred to declares, that "all bonds, bills, or notes, which shall be made payable to any person, or persons, or bearer, or to any corporation, or bearer, shall have the effect of creating an obligation, or liability, in favor of the corporation, or person, or persons only, to whom any such bond, or note, may be expressly made payable, and no one but such person or persons, or their endorsee, or personal representative, shall have a right to maintain, in his own name, an action upon any such bond, bill, or note."

This statute was enacted, as the title indicates, to "prevent the institution of illegal and oppressive suits in the United States' courts, in this State. The preamble refers to the practice of suing, in those courts, in the name of some "pretended, or fictitious bearer, for the purpose of giving jurisdiction to said courts," "on notes and bills of exchange made payable to bearer, and on endorsements in banks." It does not speak of notes or bills, *issued by* banks, or banking institutions of any description, chartered, or unchartered: consequently, it would be fair to infer, that the Legislature intended to embrace only, notes or bills made by individuals, or co-partnerships, in the course of their ordinary business transactions. Statutes can only be fairly interpreted, by having reference to the history, and circumstances of the times, in which they are enacted. Independently of the evil, alluded to in the preamble of the act, as requiring a remedy, we know that our Legislature has treated banks and individuals, and their respective rights and remedies, separately and distinctly, in a long course of enactments. They have, in fact, treated them as different classes; and it would violate established rules of construction, to apply, by intendment, a statute having obvious relation to one class, to another. Such notes, bills, and bonds, as were usually sued upon in the courts of the United States, constituted the class of contracts intended to be embraced by the act of 1837; and, we presume, there had been no instance of an action, brought in those courts, on contracts of the form and nature, ordinarily issued by banks.

It is unnecessary, however, to pursue the discussion of this branch of the case, further, on this occasion. If the act of 1837 did embrace notes and bills issued by banks, and banking associations, the Legislature was entirely competent to repeal, or modify it, by subsequent enactment—and, as we believe, have exer-

cised that power, in the act of February 2d, 1839, entitled "an act to prohibit unlawful banking associations, and for other purposes." [Meek's Sup. 41.] The first section made it "unlawful for any person or persons, or any company, corporation, or unchartered banking association, to make, emit, issue, or put in circulation, any note, bill, bond, draft, check, or post note, or paper of any name or description whatsoever, to answer the purposes of money, or for general circulation, &c." and declared every such act a misdemeanor, indictable, and punishable by fine, not less than one hundred, nor more than five hundred dollars. The 2d and 3d sections, provided penalties for signing such notes, bills, &c., and for putting them in circulation. The three first sections of this act have been superseded by the provisions of the penal code, [chapter 7, § 1, 2 and 3,] and are only referred to now, as indicating the object and policy of the Legislature, and aiding us in the construction of the unrepealed portion. Section 4, which still remains in force, provides, "That each and every person, who may be a partner, or stockholder, in any company, corporation, or *unchartered banking association*, shall be liable *to the holder* of any note, bill, bond, or post note, issued, emitted, or put in circulation by said company, corporation, or unchartered banking association, for the amount of said note, bill, bond, or post note, whether he be a limited copartner, or not, *which may be recovered by the holder thereof*, before any court having competent jurisdiction."

The Legislature must be presumed to understand the subjects upon which they legislate. They cannot be supposed ignorant of the fact, that notes or bills, issued by banking associations, chartered, or unchartered, are usually made payable to some person, or bearer. They have declared that *the holder* of any such paper may maintain an action, not only against such company, but against each and every person who may be a partner thereof, whether limited or not. The manifest objects of the act were, not only to prohibit unlawful banking associations, but to facilitate recoveries against them, and each of their members or partners; to remove pre-existing obstacles, and provide a new and easier remedy. If the act of 1837 even was applicable to bank notes, or bills, the provisions of the act of 1839 are repugnant to it, and must repeal, or modify it *pro tanto*.

If it were necessary, further, to sustain this construction of the

act of 1839, we might call to our aid its 7th section—though it has ceased to operate, by its own limitations. That section, so far from requiring endorsement to give the holder a right of action, declared that any person or persons, who should, before the first day of July ensuing its date, pass off, or transfer by delivering any such bill, bond, or note, &c., as mentioned in the preceding sections, should "be deemed, and taken as the endorser thereof," and liable to the person to whom the same was passed off, or transferred, for the amount of the paper, "without notice, protest, suit, or demand against the makers of the aforesaid papers." It would be very unreasonable to suppose, that the Legislature, while giving the holder of such paper a right of action against the person who had transferred it by mere delivery, and holding him bound as an endorser, without notice, protest, or suit, or demand against the makers, should not have intended to give him a remedy against the makers, as clear, and unembarrassed by forms and restrictions.

The case of Elliott, for the use of Hand, v. Montgomery, decided by this court, at its last term, has been referred to, and relied on by the counsel for the plaintiff in error. The question under consideration was not presented by that case, and, of course, could not have been decided. The suit had been instituted on two twenty dollar notes, issued by the Real Estate Bank of Caledonia, Mississippi. Elliott being a partner in the concern, and the notes payable to him, or bearer, Hand, the holder of them, instituted the suit in the name of Elliott, for his use. The court below instructed the jury, that as Elliott and the defendant were both partners in the association, the action could not be sustained in the name of the former, even as nominal plaintiff, for the use of the real owner. This opinion was excepted to, and afterwards assigned for error. Yet the court held that the action could be maintained, although at common law, generally, one partner can not sue another; and although the payee, being a partner, and liable for the money, it might sometimes become necessary to enforce payment against him. The judge, who delivered the opinion, remarked, "it is not necessary, that the court should now express an opinion upon that case, but, for myself, I see no reason why, even then, the general rule should not yield to the necessity for giving a speedy and effectual remedy at law." He further remarked, as the result of his examination of authorities in the

case, "that courts will always mould their proceedings so, as to afford a remedy, although at first view it may seem to be inconsistent with principles generally recognized."

It may be further remarked, that the act of 1839, which has been before noticed, does not appear to have been brought to view, or considered in the case of Elliott, use, &c. v. Montgomery. Yet it seems to us abundantly sufficient, of itself, to warrant the institution of the action against the plaintiffs in error in the names of the defendants, *as holders* of the several notes sued on; and, therefore, in our opinion, the court below did right in overruling the demurrers to the declaration.

It is further assigned for error, that the finding of the jury was upon an issue of law, and not of fact.

The record does not show any other issues of law, than those formed by the demurrers and joinders already noticed. We have seen that the court below properly disposed of them. But, the defendants in that court do not appear to have answered over—at least no plea appears upon the record; but it sets forth in the usual form: "This day came the parties by their attorneys, and then also came a jury of twelve good and lawful men, to-wit, Daniel L. Ayres and eleven others, who being elected, tried, and sworn to speak the truth upon the issue joined between the parties, &c."

This question has often been presented in this court, with the same result. In a late case, [Clark's adm'rs vs. Stoddard, Miller & Co., 3 Ala. Rep. N. S. 366] no issue appeared upon the record: after remarking upon the current of decisions for some years past, the court said, "When the parties appear, and submit their cause to a jury, we must presume, if no issue appears in the record, that it was waived by the parties; that the defendant, having no defence to make, permitted judgment to pass without opposition." Here, the parties did appear and submit their cause to a jury, who gave a verdict for the plaintiffs.

Let the judgment of the court below be affirmed.

FITZPATRICK, ET ALS. v. B. & W. EDGAR.

1. A *scire facias* against the heir, to subject lands descended to him, to the payment of a judgment obtained against the ancestor, must be sued out in conformity with the statute of this State, and therefore the executor or administrator must be a party.

Error to the County Court of Montgomery.

This was a *scire facias* sued out at the instance of the defendants in error against the *terre* tenant and heirs of Joseph Fitzpatrick, deceased, and others alleging that on the 10th December, 1840, the plaintiffs recovered a judgment against Joseph Fitzpatrick, deceased, for $1192 91 damages, besides costs, and six other persons, who are named; that execution of the damages and costs aforesaid, remain to be made, and commanding the sheriff to make known these facts to the tenant in possession of the lands of Joseph Fitzpatrick, and others, his heirs, who are named in the writ, to show cause why the damages and costs ought not to be made out of the lands and tenements of the deceased, and that the other defendants show cause why the damages and costs ought not to be levied of their goods and chattels, and also of the lands and tenements they were seized of on the 10th December, 1840.

To this writ, which was returned executed, the tenant in possession and heirs of Joseph Fitzpatrick, deceased, demurred, and the plaintiffs joined in the demurrer, which was overruled by the court.

They then pleaded that after the death of Joseph Fitzpatrick, and before the said *scire facias* issued, one Abram Martin took out letters of administration upon the estate of said Joseph Fitzpatrick, in the Orphans' court of said county, and afterwards, and before said *scire facias* issued, reported the said estate insolvent to said court, which report was by the said court allowed and received, to wit, on the —— day of ——, and before the said *scire facias* issued; and that within three months after making said report of insolvency, the said administrator made application for leave to sell the real estate of said Joseph Fitzpatrick, which

was granted by the court before the said writ of *scire facias* issued, all of which remains in full force and unreversed, &c.

To this plea the plaintiff demurred, and the court sustained the demurrer.

The heirs and *terre* tenant declining to plead over and admiting that the said Joseph died seized and possessed of the land as returned by the sheriff, and the other defendants appearing by attorney, and saying nothing in bar or preclusion of the right of the plaintiff to have execution against their goods and chattels, lands and tenements; and it appearing to the satisfaction of the court, that judgment was obtained, &c. ordered that the said plaintiffs have execution, &c. An agreement was entered of record that the rights of Sarah Fitzpatrick, as the widow of the deceased, should in no manner be compromitted by this judgment. The assignments of error are,

1. The court erred in overruling the demurrer to the *scire facias*.

2. In sustaining the demurrer to the plea of the defendants.

3. In awarding execution both against the lands of Joseph Fitzpatrick, and against the other defendants generally.

Elmore, for the plaintiffs in error. Lands at common law, were not subject to execution, and the proceeding by *scire facias* to subject them in the hands of the heirs is derived from the statute. The statute prescribes that the personal representative must be a party. [Aik. Dig. 156, § 17.] None of the requisites of the statute have been pursued.

When the administrator reported the estate insolvent, the title of the heirs was divested, and vested in him as the officer of the law. The lands then became assets in his hands to pay debts generally, as prescribed by the statute. The plaintiff can be in no better condition, and has no better right to an execution against the lands than against the goods of the deceased, and as to the latter, he has lost his priority by failing to sue out execution before the death of the ancestor. [4 Stewart & P. 237.]

The statute requires *scire facias* to the administrator, as well as the heirs upon a judgment against the intestate in his life time.

Goldthwaite, *contra*. In England, on a recovery against the ancestor, lands subject to execution in his life time may be

made liable after his death by *sci. fa.* against the heirs and *terre tenants.* [2 Saund. 30, note 4; 6 Bac. Ab. 114, 115; 1 Stewart 193.]

In this State, lands of the debtor are bound from the rendition of judgment. [3 Ala. Rep. 560; 1 Brock. 166.]

It is not necessary to make the personal representative a party on a judgment against the intestate. The statute relied on by the other side was intended for the case of a judgment against the personal representative, who neglected to obtain an order of sale of the lands.

Upon the death of the defendant, the descent is cast upon the heir incumbered with the *liens* created by the judgment.

ORMOND, J.—The question to be decided is, whether on a judgment recovered against the ancestor, the plaintiff can have execution against the heir upon *scire facias*, for lands descended without including the personal representative, no execution having issued on the judgment.

It appears that at common law, this writ lies in favor of the plaintiff against the heir, upon judgments after a year and a day. [Withers v. Harris, 1 Salk. 600.] It is however, stated in the Institutes, that this remedy at common law was confined to real actions, and was given in personal actions by the statute Westminster, 2; [3 Thomas ed. Co. Litt. 524; 290 b.; 291 a; Jefferson v. Morton, 2 Saund. 30, Note, 4.]

In the case of Bell v. Robinson, [1 Stewart, 193,] this court held, that this remedy could not be had against the heirs where the judgment was obtained after the death of the ancestor against his personal representative; after this decision was made, the following act was passed. "Whenever an executor of any deceased testator, or administrator of any deceased intestate, shall fail to apply to the county court for the sale of real estate, for the purpose of paying the debts due thereof, the judgment creditor may, upon filing a suggestion in the clerk's office, in which judgment shall have been rendered, that real estate has descended to the heirs, and that sale of the same, or some part thereof, is necessary for the satisfaction of said judgment, and that said executor or administrator, has failed or refused to make application for sale thereof, and setting out the names of said personal representatives and heirs, sue out a *scire facias* against said executor or admin-

istrator and heirs, returnable to the next term of said court, requiring them then and there, to show cause why said plaintiff should not have execution against said real estate; and if sufficient cause to the contrary be not shown, execution shall be awarded against said real estate; and all executors or administrators who fail to apply for leave to sell real estate, three months after reporting the estate insolvent, shall be deemed guilty of a devastavit, and may be sued on their bond, together with their securities." [Aik. Dig. 156, § 17.]

It is insisted that this statute applies only to cases where the judgment is obtained against the personal representative, and not where it is obtained against the ancestor, but we are unable to perceive any reason for giving to it such a limited interpretation. The language is general and sufficiently comprehensive to embrace all cases of judgments which bind the realty. A construction which would confine this statute to those cases only where the judgment was obtained against the personal representative, and making thereby by implication, an exception in favor of creditors who obtained their judgment against the ancestor in his life time, would be contrary to the whole scope and design of our legislation on this subject, by which the common law preferences of certain creditors is destroyed, and the property of the deceased distributed rateably, where it is insufficient to pay all the debts.

Nor can we conceive of any adequate motive for confining the statute to those cases where judgments had been obtained against the personal representative. When a suit is prosecuted against the personal representative, if he omits to plead his want of assets, the judgment is binding on him personally, there would therefore seem to be more reason for supposing that the statute was intended for the benefit of creditors who had obtained judgments against the ancestor, than of those who obtained it against the personal representative. It is the duty of the personal representative to pay all the debts of the deceased, those which have been matured into judgments before his death, as well as those which have not. The natural and appropriate fund for this purpose is the personal estate, but if that is insufficient, it is his duty to obtain an order to sell the lands, which by law, is created a fund for that purpose, whether the estate is entirely insolvent or not. [Woods v. McCann & Witherspoon, 3 Ala. Rep. 61.] If he fails to do this, a summary remedy may be had against the land in the

possession of the heirs. If he fails for three months after reporting the estate insolvent to apply for leave to sell the lands, he is guilty of a devastavit, and may be sued on his bond.

It appears from this examination that judgment creditors, whether the judgment was obtained previous or subsequent to the death of the testator or intestate, are fully provided for, at least to the extent of the estate of the deceased, real and personal.

It is, however, supposed that as the judgment creates a *lien* on the lands of which the defendant is seized, at the time the judgment is obtained, that judgments obtained during the life of the testator should be satisfied out of the real estate after his death, in preference to judgments of later date.

A *lien* is not an absolute, but a qualified right, given by law or created by the act of the parties, by which real or personal property is charged with the payment of a debt or duty. Mr. Justice Buller defines a *lien* to be a qualified right, which in given cases may be exercised over the property of another. [Lickbarrow v. Mason, 6 East, 25 note.] In this sense it is employed by our Legislature, in determining the priority of *liens* between judgment creditors. [Aik. Dig. 166.] A *lien* on land in virtue of a judgment, being then merely a right to charge the land with the payment of the judgment, may be waived, or lost by the *laches* of the party entitled to enforce it. So, a *lien* created by law, may be taken away by law, as was held by this court, at the last term, in the case of Watson and Simpson v. Simpson, *supra.*

The plaintiff in this case might have enforced his lien by selling the lands of the deceased if he had thought proper to do so. He has lain by until the administrator has reported the estate insolvent, which by operation of law divests the estate out of the heirs at law, and vests it in the administrator for the purpose of equal distribution; and it would be contrary to the whole scope and design of the statute, and defeat its avowed object, if he took the estate charged with the payment of such dormant *liens;* as the *lien* of an execution on personal property, may be lost by the *laches* of the creditor; [Blount & Stanly v. Traylor, 4 Ala. 667;] so may the *lien* of a judgment on land be lost in the same way. [Ib. 543.]

There is still an objection to be considered, equally potent with any yet mentioned. It appears to be doubtful whether at common law a *scire facias* would lie against the heir upon a judg-

ment obtained against the ancestor in a *personal* action, or whether the remedy was not given by the statute of Westminster, 2d; but conceding that question, it was not a right to *sell* the land in the hands of the heir, but to *extend* it by the writ of *elegit*. The right to sell land in discharge of judgments is given by our statute, which declares that lands shall be subject to the payment of judgments, and that the clerk shall frame the "execution." To infer from this statute that a *scire facias* would lie against the heir after the death of the ancestor, would be putting a most unreasonable construction on it. The only statute we have, in terms authorising such a proceeding against the heir, is the one already cited, and that requires the administrator to be a party; obviously for the purpose of enabling him to show whether the estate is insolvent. It appears therefore to follow, quite conclusively, that as the right to *sell* lands in the hands of the heir, to satisfy a judgment of the ancestor, did not exist at common law, such right if claimed here, but must be exercised in conformity with the statute.

It results from this examination, that this proceeding cannot be sustained, and it therefore becomes unnecessary to enquire into the correctness of the entry of judgment.

Let the judgment of the court below be reversed.

LUCAS v. THORINGTON.

1. The plaintiff and defendant were mutually indebted to each other upon accounts. The account of the former was stated at $1594 20-100, of the latter at $102 50-100. Both of the accounts were barred by the statute of limitations; on the plaintiff's the defendant made the following indorsement, which was subscribed by him, viz: "I admit the correctness of the within account with the exception of the item for $520 paid W. D. Bynum, upon an order purporting to be drawn by me, which I do not admit, March 31st 1838." The plaintiff made an admission on the defendant's account as follows: "The above account is correct, and I agree to allow it against my account on settlement."

Held, that the indorsement by the defendant was not a conditional admission that the excepted item was a proper charge, and a waiver of the statute of limitations, upon the plaintiff's making proof of its correctness.

WRIT of Error to the Circuit Court of Montgomery.

This was an action of assumpsit, by the defendant in error against the plaintiff, and was tried on the pleas of *non-assumpsit*, payment, set-off and the statute of limitations. At the trial, the defendant excepted to the ruling of the court. From the bill of exceptions, it appears that the plaintiff offered in evidence an account for professional services, money paid, money lent and advanced, &c., at the instance, and for defendant's benefit, amounting in the aggregate to the sum of fifteen hundred and ninety-four 20-100 dollars. At the foot of the account, a credit is stated for eleven hundred and two 50-100 dollars, with a balance struck of four hundred and ninety-one 70-100 dollars as still due the plaintiff. On the back of the account an admission signed by the defendant is written in these terms: "I admit the correctness of the within account, with the exception of the item for $520 paid W. D. Bynum, upon an order purporting to be drawn by me, which I do not admit; March 31st 1838."

The plaintiff then adduced an order purporting to be drawn by the defendant on the 16th May, 1828, in favor of Bynum, for the money, as it recites, left by defendant in plaintiff's hands; and at the foot thereof is a receipt dated the 18th May, 1828, for five hundred and twenty dollars in U. S. Bank notes. He also offered evidence tending to show that the order though not signed by the defendant, was drawn and subscribed by his direction, and the money received by him; but the defendant attempted to prove that he was not bound by the order, and offered an account for the amount with which he was credited by the plaintiff, in which among other items, is one for seven hundred dollars cash, placed in plaintiff's hands "to purchase Copeland's judgments."

On the defendant's account is an admission by the plaintiff as follows: "The above account is correct, and I agree to allow it against my account on settlement."

Both the accounts were barred by the statute of limitations, unless relieved from its operation by the admissions of the respective parties.

The court instructed the jury, that the indorsement on the accounts, if proved, were sufficient to take the contested item out of the statute of limitations; and if defendant was bound by the order to Bynum, the statute should not apply to it, when it did not to the rest of the account. A verdict was returned for the plaintiff, and judgment was thereupon rendered.

Elmore, for the plaintiff in error, cited 6 Term Rep. 189; 1 M. & P. Rep. 487; 3 B. & C. Rep. 10; 4 Bing. Rep. 315, 5 Id. 455; 15 Johns. Rep. 511; 7 Wend. Rep. 408; 7 Greenl. Rep. 307; 3 Har. & Johns. 266; 7 Hals. Rep. 339; 7 Wend. Rep. 322; 3 Bing. Rep. 329; 3 S. & R. Rep. 211; 9 Id. 128; 1 Ala. Rep. N. S. 482; 3 Wend. Rep. 532; 7 Id. 267; 15 Johns. Rep.; 3 Id. 511.

J. Thorington, for the defendant, cited 6 Term Rep. 189.

COLLIER, C. J.—The accounts of the parties are made up of distinct items, and the acknowledgment of the justness of one, and a liability to pay, cannot withdraw the others from the influence of the statute of limitations, upon any other hypothesis than that the waiver of a defence, as to a part, precludes the defendant from defending as to the residue. No such ground has been assumed by the defendant in error; but he insists that the law was correctly laid down in the circuit court, because the terms of the admission show, that the statute was not intended to be relied on, but the object of the parties was merely to confine the litigation to the question of the legal liability of the defendant below, to account for the money advanced upon the order to Bynum, without regard to the length of time since the transaction took place. Such may have been the object of the parties, but we can only know their intentions from what they have expressed in writing. What then has the defendant said? That he admits the correctness of the plaintiff's account, with the exception of the item to which we have referred—that he denies to be correct. This admission, with its saving, cannot be construed to be a conditional promise, viz: that the defendant will pay all the plaintiff's account if the latter will establish the part that is disputed. In respect to the part denied to be just, there is no admission or promise, but a protestation of its injustice, and a consequent unwillingness to pay it.

In this view of the facts, it is clear that there is nothing that amounts in law, to such a promise, as will take the case out of the statute. The leading cases on this point, are collected and the result stated in Crawford and another v. Childress's ex'rs, [1 Ala. Rep. N. S. 488.] There it was held, that "an acknowledgement which will revive the original cause of action must be unqualified and unconditional. It must show positively that the debt is due in whole, or in part. If it be connected with circumstances, which in any manner affect the claim; or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it must be shown." So "if there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be any accompanying circumstances which repel the presumption of a promise, or intention to pay; if the expressions be equivocal, vague, and indefinite, leading to no certain conclusion, but at best, to probable inferences, which may affect different minds in different ways, we think they ought not to be received as evidence of a new promise to revive the cause of action."

Here there is no acknowledgment of a present or past liability as to the five hundred and twenty dollars, but an explicit denial of both; and for this reason, the case cited, is conclusive against the plaintiff upon the evidence in the record. The judgment is consequently reversed, and the cause remanded.

CLAY, J.—Not sitting.

BROWN v. BROWN.

1. In detinue, on proof of demand and refusal, to deliver the property, it is not competent to prove what the defendant said in relation to his title, to the property in controversy.
2. A witness, who has an interest in the event of the suit, may be rendered competent by release, from the person to whom he may be liable—and a delivery by the releasor to the releasee, personally, is not necessary—it may be filed in court.
3. Adverse possession of personal property in this State, for six years, will give a title to the possessor—or, if such possession is had in any other State, a sufficient time to bar an action for the recovery of the property, by the laws of such State.
4. The judgment of the Court, in detinue, should be for the recovery of the specific property, or its value assessed by the jury, in the alternative.

ERROR to the Circuit Court of Greene county.

Beverly Brown brought an action of *detinue* against John Brown, in the Circuit Court of Greene county, to recover a negro man. The defendant relied on the plea of *non detinet.* On the trial of the cause, the defendant excepted to the opinion of the court, to the following effect:

The plaintiff having proved that, a short time before the commencement of the action, he demanded the negro, sued for, of the defendant, who refused to deliver him—the defendant's counsel, in cross-examining the witness, asked him to state the conversation which then took place between the plaintiff and defendant, in relation to said negro, and the title to him; and the manner in which the defendant obtained the possession of him; to which question the plaintiff objected; the court refused to allow the question to be propounded, and excluded the evidence of said conversation from the jury; and to that opinion the defendant excepted.

The defendant proved that the negro in controversy had formerly been the property of one Sarah Rainy, the mother of the plaintiff and defendant, in South-Carolina, who was then, and still is, the wife of one Thomas Rainy, now living—that the plaintiff claimed said negro by gift from his said mother—and the defendant then proved a bill of sale executed to him for said negro, by said Thomas Rainy and Sarah Rainy, containing a warranty of

title of said negro to said defendant. The defendant then proposed to read, in evidence to the jury, the deposition of said Thomas Rainy, duly taken; to which said plaintiff objected on the ground that said Thomas Rainy was interested in the event of the suit; and the defendant then proposed to prove, that he had released said Thomas Rainy from all liability on account of his said warranty of title, by answer of said Rainy, in his said deposition, in which the witness, in answer to a question to him, as to whether defendant had released him, and requesting him, if said release had been given, to append said release, or a copy of it to his deposition; stated that the defendant had so released him, and that such release was delivered to him before he was sworn and examined, and a copy of said release appended to the deposition; but the court decided that such evidence of a release was not admissible, but that it was incumbent on the defendant to produce the original release. The defendant then offered to prove, that he, being in the State of Alabama, and said witness in the State of South-Carolina, in order to make said witness competent in this cause, had executed a release to said Thomas Rainy in duplicate; that he filed, in the clerk's office of Greene county, said release, before taking out the commission to take said witnesses' deposition, and that he also signed and sealed a counterpart of said release, and sent it on to the commissioners, appointed to take the deposition of said witness, to be delivered to him, before he was sworn and examined; and that the copy of the release, appended to the deposition of said witness was a correct copy of the one so sent on; and said defendant further offered to prove the signing and sealing of said release, and filing it in the clerk's office, as aforesaid; all of which evidence the court excluded, on the ground that there was no evidence that the same had ever been delivered to said Rainy, personally, or that he knew of its existence; and the court also excluded the deposition of said Rainy from the jury, and the defendant excepted to the opinion.

The plaintiff having introduced evidence conducing to show, that he had *had* possession of said slave more than six years—during a part of that time in the State of South-Carolina, and the remainder of the time in the State of Mississippi, but no evidence having been given, that said plaintiff ever had possession of said slave in the State of Alabama—the court charged the jury, that six years adverse possession of the slave would give the plaintiff

a good title to him, against the defendant, and that it made no difference, whether such possession was had in the State of Alabama, or in other States; to all which the defendant excepted.

The jury found a verdict for the plaintiff, assessing the value of the slave at $700, and damages at $975; upon which verdict, the court rendered judgment "that the plaintiff recover of the defendant the sum of seven hundred dollars, being the value of the slave Charles, and also the sum of nine hundred and seventy-five dollars, for his damages, as his hire for slave Charles, by the jurors aforesaid assessed, and also the costs, &c."

From that judgment, this writ of error is prosecuted by the plaintiff in error (defendant below) who makes the following assignment:

1. The court erred in excluding from the jury, the conversation between the plaintiff and defendant, at the time the demand of the slave was made, when the same was demanded by the plaintiff in error, upon cross-examination.

2. The court erred in excluding the deposition of Thomas Rainy from the jury, and in the opinion, that the proof of *release* of *interest*, was insufficient.

3. The court erred in the charge to the jury, that adverse possession for six years, whether such possession was had in other States, and not in the State of Alabama, was sufficient to give the defendant in error a good title to the slave.

4. The verdict and judgment are erroneous, because not in the alternative.

Murphy & Jones, for the plaintiff in error.

CLAY, J.—The bill of exceptions, in this case, presents three points for the consideration of the court, under the plaintiff's assignment of errors.

1. The first is, whether the court below erred in excluding evidence of the conversation, which ensued the demand of the slave, to recover which the action is instituted, and the refusal of the defendant, below, to deliver him. It appears the defendant's counsel, on cross-examination, asked the witness to state the conversation which then took place between the parties, in relation to the negro, and the title to him.

While, on the one hand, a party of whom property is demand-

ed, may state any reasonable excuse, for refusing to deliver it—as, for example, that the property has been found, and he must have evidence of the demandant's owuership, before its delivery; or that he holds the property under a bailment from another, who claims title, and the like: on the other hand, we must be careful not to infringe another salutary principle—which is, that no one shall be permitted to give or make evidence for himself. Here, the question went, not only to the conversation, in relation to the slave, but, also, the title to him: consequently, the defendant would have been availing himself of his own statements and declarations, in support of his title. In the case of Dent & Cade v. Chiles' adm'r, [5 Stewart & Porter, 383] the plaintiff in an action of trover, had proved a demand of the property; and the defendants offered to prove, by the same witness, the reply they made, at the time of the demand. The court below excluded this testimony, and was sustained in that opinion by this court. In the case of St. John, surv. v. C'Connel, surv. for the use, &c. [7 Porter, 474,] which was an action of trover, to recover for the conversion of two promissory notes; the plaintiffs, on the trial, in the court below, proved a demand of the notes; on cross-examination, the witness was asked what answer was made by the defendants; the court excluded the evidence, and on exception to the opinion, the question was brought before this court. In the opinion delivered by the court, the case of Dent & Cade v. Chiles, adm'r, was cited, and the principle laid down in that case fully sustained. The result of all the authorities, we have examined is, that a party, of whom property is demanded, may prove *a qualified* refusal—whatever may amount to *a reasonable excuse* for the non-delivery of the property; but he cannot be permitted to prove any of his own declarations of title, or property, in the thing demanded: that would be allowing him to make evidence for himself.

2. The next question is, did the court err in the exclusion of the deposition of Thomas Rainy?

The defendant in the court below, claimed under a bill of sale, with warranty of title, made by Rainy and another person: the objection was that he was interested, and therefore incompetent. But the defendant proved, or offered to prove, that he had executed a release, in duplicate, one copy of which he had filed in the clerk's office of Greene county, before the commission was taken

out to take the deposition of the witness; and that the other had been sent to the witness in South Carolina, with a request, that he would append to his deposition, either the original release, or a copy; the witness did append a copy, and testified, that he had received the original, before he gave his testimony. The court below excluded the evidence on the ground, that *it was not shewn that the release had been delivered to Rainy personally, or that he knew of its existence.*

In this opinion, we think, the court erred: there was competent and sufficient evidence of Rainy's release, and his evidence should have been admitted. In Greenleaf on Evidence, 475–6, it is laid down, that "it is *not necessary* that the release be *actually delivered*, by the releasor into the hands of the releasee. It may be deposited in court for the use of the absent party. Or, it may be delivered to the wife, for the use of the husband." We think this doctrine just and reasonable. When a witness has been interested, it is enough, that he has been so released, by the party to whom he was responsible, that he is no longer liable, and that he knows he is so released. Here the party offered to prove the execution of duplicate releases; one of which was filed in the clerk's office, and ready to be produced and proved; and the counterpart proved by the witness, to have been received by him, before he gave his evidence, and a copy thereof appended to his deposition. The evidence could not well have been more full as to the execution of the release and its delivery, when the parties resided so remote from each other.

3. The result of our examination of the second point, would dispose of the case here; but, as it must be remanded, it is proper that we should notice the charge of the court, which was in effect, that adverse possession for six years, although such possession may have been had in other States, and not in the State of Alabama, was sufficient to give the plaintiff below a good title to the slave.

The true principles, which govern this question, were laid down in the case of Goodman v. Munks. [8 Porter, 84.] In regard to *remedies*, for the enforcement of contracts, or to obtain compensation for a breach, they are to be regulated and pursued according to the *lex fori*, and not the law of the place, where they are made. But the *nature, validity, construction*, and *effect* of contracts, are to be ascertained by the *lex loci contractus*—and

that law is considered as much a part of the contract, as if it were expressly inserted in it. Here, the plaintiff below relied on evidence of his adverse possession for six years—not in Alabama—nor did he prove such possession in any one State, for a sufficient length of time, to constitute a bar to a recovery in that State, so far as any thing is shewn by the record, If, for example, the plaintiff had shewn such a possession for four or six years, in South-Carolina, or in Mississippi; and that, by the laws of South Carolina, or Mississippi, a possession for the length of time, proved in either, would have protected his title, or barred a recovery against him; or if the length of his possession in Mississippi, added to that in South-Carolina, had been shown sufficient to constitute a bar, under the laws of Mississippi, the charge of the court below would have been correct. But such is not the state of facts shewn by the record. The court held, that such adverse possession would give the plaintiff a title, in whatever other States held. The rule, as laid down by this court in the case of Goodman v. Munks, before cited, is, that when personal property has been adversely holden in one State, for a period beyond that prescribed by the laws of that State, as constituting a bar to recovery, and after that period has elapsed, the possessor removes into another State, which has a longer period of prescription, the original holder cannot successfully assert a title in the latter State against the possessor. [See the case of Goodman v. Munks, 8 Porter, 94–5, and the cases there cited.]

Such being our view of the authorities, we think the charge of the court below was erroneous.

4. In regard to the last assignment of errors—the judgment not being entered in the alternative—there is error. But, the verdict being properly rendered, the judgment could be very easily and safely amended. It is, however, unnecessary to examine this point. For the errors before noticed, the judgment of the court below must be reversed, and the cause remanded.

EX'RS OF TILLINGHAST v. JOHNSON, USE, &c.

1. When a garnishee is summoned to answer what he is indebted to the defendant in attachment, or what effects of his he has in hands, and appears and answers that a certain person deceased was indebted in a particular sum to the defendant, and that he is his executor—no judgment can be rendered against him in his character of executor, until he is summoned to answer in his representative capacity, as it is the levy on the debt in the hands of the garnishee which gives the court jurisdiction.

ERROR to the Circuit Court of Marengo.

This suit was commenced in the court below, by the defendant in error against Robert H. Dansby, on a promissory note, pending which, under the act of 1837, affidavit was made, and an ancillary attachment sued out, by which Mrs. M. A. Tillinghast was summoned as garnishee, to declare on oath what she was indebted to Robert H. Dansby. Subsequently, upon a suggestion that Mrs. Tillinghast had intermarried with John B. Hogan, a *scire facias* issued to make him a party to the garnishment. Hogan and wife appear and answer, denying any individual indebtedness, but admitting that Daniel H. Tillinghast, the testator of Mrs. Hogan, was indebted to one John Whitfield in a sum of money secured by two promissory notes, which they are informed are now the property of Dansby, upon which they admit to be due $2381 56, besides interest.

The record does not show that any judgment was entered upon this answer at the time at which it was made, but at the next term a judgment was entered *nunc pro tunc* against them as executors, to be levied, &c.; from which they prosecute this writ.

Several causes of error were assigned: two only require to be noticed.

1. The garnishment was sued out against Mrs. Tillinghast individually, and the judgment is against her as executrix.

2. That the court erred in rendering judgment against executors on a garnishment.

STEWART, for plaintiff in error.
MANNING, *contra.*

ORMOND, J.—The question whether process of garnishment under our attachment law, can be sued out against executors or administrators, to condemn a debt due from the deceased to the defendant in attachment, although not directly adjudicated by this court, appears to have received its sanction. [See the case of Terry v. Lindsay, 3 S. & P. 317.] The garnishees in this case were summoned under the 10th section of the act of 1839, permitting ancillary attachments to be issued in aid of suits already commenced in the ordinary mode, and gives to the levy on the debt, in the hands of the garnishee, the same effect as when original attachments are sued out.

Conceding then that a judgment may be rendered against an executor or administrator, as such, when summoned as a garnishee, can such judgment be rendered upon his answer, admiting the indebtedness of his testator or intestate, when he has been summoned to appear in his individual capacity. The levy of an attachment on property is, by our attachment law, a substitute for, and is precisely equivalent to service of personal process, and such levy creates a *lien* on the property attached, whether it be a chattel seized by the sheriff, or a debt attached in the hands of the garnishee. [Carey v. Gregg, 3 Stewart, 433; Thompson v. Allen, 4 Stewart & Porter, 184.]

By operation of law then, the process of garnishment, when served on the garnishee, creates a *lien* on the effects of the defendant in attachment in the hands of the garnishee, and as this consequence flows from the execution of the process, it results necessarily, that the debt which is to be thus attached, must be described in the mode pointed out in the statute, which is an allegation under oath, that the garnishee is supposed to be indebted to, or to have effects of the defendant in his hands. It cannot, with any propriety be asserted, that the summons to the garnishees, in this case, to appear and answer what they are indebted to the defendant in attachment, created a *lien* on a debt which they did not owe, but were merely bound to pay, if sufficient assets came to their hands.

To test this matter, suppose that after the service of this garnishment, the garnishees had paid the debt due from their

testator to the defendant in attachment, would the summons have been notice so as to charge them? It is very clear that it would not, because the service of the garnishment created no *lien* except on debts which they owed in their own right to the defendant, or on effects of his in their hands. The counsel for the defendant in error, however, supposes, that as the garnishees appeared and answered without objection, that their testator was indebted to the defendant, that no sensible object would be attained by issuing another summons against them in their representative character. This argument is plausible, but the answer to it is, that until the garnishees admitted themselves to be indebted, as alledged in the summons of garnishment, or until such indebtedness was found to exist, by the verdict of the jury, if denied by them, the court had no jurisdiction to render a judgment against them.

It may be that when summoned in their representative character, they may not be able to alledge any reason why a judgment should not be rendered for the debt, but that opportunity has not yet been afforded them. Their answer that their testator was indebted to the defendant, cannot be construed into an assent to the rendition of this judgment, because they were expressly required to answer, not only as to their own indebtedness to the defendant, but also, whether they knew of any other person who was, obviously in the latter case for the purpose of ulterior proceedings. If the answer had disclosed that a third person was indebted, no one would suppose that a judgment could be rendered without notice to the party to appear and contest it, and yet there is no sensible distinction between that case and the present. The admission that the testator was indebted, does not tend to prove that there are any assets in hand to discharge it, and yet the effect of this judgment is, that a return of no property found, would be evidence of a *devastavit*, so as to charge the garnishee personally.

We are, for these reasons, of opinion, that the judgment of the court below, against the garnishees, must be reversed.

ALEXANDER, BY HIS GUARDIAN, v. ALEXANDER.

1. It is competent for the chancellor to determine the question of lunacy, when raised upon the pleadings, without directing an issue for the purpose of informing his conscience in the matter.
2. If either party is dissatisfied with the verdict on a feigned issue, an application should be made, not to the court in which it was tried, but to the court of chancery, where, notwithstanding the improper reception or rejection of evidence, a new trial will not be granted, if the result is such as it should have been.
3. Although it is not competent to revise on error, a question of law reserved by bill of exceptions upon the trial of an issue out of chancery; yet as the question is a novel one in our courts, it may be regarded as sufficiently "substantial," to authorise an appellate court to look into, and vary a decree as to costs, if incorrect.
4. The guardian of a lunatic, who has a just pretence for suing, and has conducted himself fairly, is not chargeable with costs, although unsuccessful in the suit; and where he is charged with them an appellate court will correct the decree on writ of error, if some other substantial ground of appeal be joined, and charge the estate of the lunatic with the entire costs.

WRIT of Error to the Court of Chancery sitting at Montgomery.

The plaintiff in error filed his bill, by guardian, alleging that he had been formally married to the defendant, in August, 1839; that at the time of such marriage, previously and since, he was incapable, by reason of the want of understanding, to enter into any contract, much less one by which a relation in life so important was formed. He affirms that his mental incapacity was known to the defendant, and prays that the marriage solemnized between them may be declared null and of no effect in law. It is also alleged, that in February, 1840, upon proceedings regularly instituted in the orphans' court of Lowndes, he was found and adjudged to be a lunatic, and that Peyton S. Alexander, by whom he now sues, was by that court appointed his guardian.

The defendant answered the bill, admitting the marriage as alleged, and affirming the sanity of the complainant at the time it was solemnized.

The cause coming on to be heard, the chancellor directed an issue to be made up, and tried by jury in the circuit court of Mont-

gomery, to determine the fact of lunacy as alleged. That issue was tried, and the complainant was found to be *compos mentis* at the time of his marriage with the defendant. On the trial, the complainant, by his counsel excepted to the ruling of the circuit judge. 1st. For refusing to exclude evidence (which had been admitted without objection,) that issue of the defendant subsequent to the marriage of the parties had been born. 2. For refusing to charge the jury that such proof should have no influence upon them in making up their verdict.

The cause coming on for final hearing, a motion was made by the complainant to set aside the verdict, but the chancellor being satisfied with the finding of the jury, the motion was overruled; and thereupon the complainant's bill was dismissed, and the costs adjudged to be paid by the guardian out of his own estate.

T. Williams, for the plaintiff in error.
Hayne and Elmore, for the defendant.

COLLER, C. J.—It is insisted that the decree of the court of chancery is erroneous. 1st. For the refusal to grant a new trial of the issue which had been tried in the circuit court. 2. In directing the costs to be paid by the complainant's guardian, out of his own estate.

1. The object of directing an issue, except where the law makes it imperative upon the chancellor, is to satisfy his conscience upon some question of fact. No matter how contradictory the proof, he may decide the case for himself without calling in aid the verdict of a jury. The present case is not an exception to this remark, though prudential reasons would have dictated the course that was adopted, yet it was entirely competent for the chancellor to have determined the question of lunacy. [Kennedy's heirs and ex'rs v. Kennedy's heirs, 2 Ala. Rep. 624.]

If either party is dissatisfied with the verdict, an application should be made, not to the court in which the issue is tried, but to the court of chancery in which the cause is pending. Upon such motion, that court will not, like a court of law, grant a new trial, upon the ground merely, that improper testimony was received, or proper testimony was rejected. Where it is satisfied, notwithstanding the improper reception or rejection of evidence, that the verdict ought to have been the same, it will not grant a new trial.

[Hampson v. Hampson, 3 Ves. & B. Rep. 41; Pemberton v. Pemberton, 11 Ves. Rep. 50; Savage v. Carroll, 2 Ball & Beatty's Rep. 444; Barker v. Ray, 2 Russell's Rep. 75; Tucker v. Wilkins, 4 Sim. Rep. 241; Apthorp v. Comstock, 2 Paige's Rep. 487; Mulock v. Mulock, 1 Edw. Rep. 17; Taylor v. Mayrant, 4 Dess. Rep. 505; Van Alst v. Hunter 5 Johns. Ch. Rep. 152.] In Barker v. Ray, *ut supra*, in which an issue had been directed and tried, the Lord Chancellor said: "In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say, that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed here to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed here; and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do, or do not satisfy him." It was also said that a misrepresentation by the judge who tried the issue as to effect of the defendant's answer, was not a sufficient ground for a new trial.

The court of chancery has such ample discretion over the subject, that it will not, *as a matter of course*, direct the issue to be tried anew, though the judge of the court of law certify that he is dissatisfied with the verdict. But it is usual, under such circumstances, to award a new trial. [Faulconberg v. Pierce, Amb. Rep. 210; Atkyns v. Drake, 1 McCl. and Young's Rep. 229; Pleasants v. Ross, 1 Wash. Rep. 156.]

In the present case, it has not been insisted, that the evidence adduced at the trial of the issue, a part from that objected to, should have led the jury to a different conclusion. If it were competent for this court to revise the decision of the chancellor upon the motion for a new trial, it would be impossible for us to say, that it operated injustice to the complainant, for the reason that the record does not inform us what evidence was before the jury, except as to the single matter stated in the bill of exceptions.

2. In respect to the direction as to the payment of the costs, it is argued for the defendant in error, that whether it be erroneous or not, it forms no ground for the reversal of the decree in the present cause. In Randolph v. Rosser, [7 Porter's Rep. 249,] it is said to have been previously decided by this court, that er-

ror will not lie to reverse a decree for costs *only*, but if open for investigation on other points, it will be reformed as to the costs. The court cite Hunt v. Lewin and Wyser, [4 Stewart and P. Rep. 147,] in which the law is laid down in accordance with the Attorney General v. Butcher, [4 Russell's Rep. 180.] In this latter case the Lord Chancellor said: "The rule is, that you cannot appeal for costs alone. But if a party appeals, having a substantial ground of appeal, and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed on the substantial ground of appeal. But if a point is brought forward as a ground of appeal, which on the slightest consideration, appears to have no substance, it would be too much to vary the decree as to costs. A point is not to be put forward as a ground of appeal, merely for the purpose of covering an appeal on the question of costs." The last sentence explains what is meant by a substantial ground of appeal. In the present case we cannot say that the point presented on the bill of exceptions, which was sealed on the trial of the issue, was not a fair question, but put forward merely to bring up the propriety of the decree as to costs. The nature of the case, and the very few points which have been here adjudicated, where issues from chancery have been tried, would rather lead to the conclusion that it was a reasonable ground of appeal.

In this view of the case, we must consider whether the estate of the lunatic should not have been charged with the costs of the suit. It is laid down generally, that trustees, who have a just pretence for suing, and who conduct themselves fairly, are not chargeable with costs. [2 Wms. on Ex'rs. 1252; Goodrich v. Pendleton, 3 Johns. Ch. R. 520; Arnoux v. Steinbrenner, 1 Paige's Rep. 82; Manny v. Phillips, 1 Id. 472; Fitzgerald v. O'Flaherty, 1 Moll. Rep. 347; Carmichael v. Wilson, 2 Id. 537; *Exparte*, Pease Tur. & Russ. Rep. 325; Brown v. Fisher, 4 Johns. Ch. Rep. 441; Matter of Arnhout, 1 Paige's Rep. 497.]

Conceding that the decree of the chancellor upon the equity of the bill was strictly correct, yet we think that the guardian of the lunatic should not have been charged with costs from his own estate. The allegations of the bill are sustained by at least four or five witnesses, whose depositions are found in the record, though the mass of the testimony may greatly incline the other

way. This is quite sufficient to show that the suit was not vexatious or without just cause. From what has been said, it is sufficiently obvious that the guardian should not have been burthened with the costs; nor should they have been imposed upon the defendant, as she was in no fault, and had made a successful defence to the suit. They should, however, be paid by some one, and the authorities abundantly show, that the estate of the lunatic in such case must bear the *expensa litis*.

The decree of the chancellor then, must be so modified as to direct that the costs be thus paid. The costs of this court cannot be imposed upon the defendant (to whom no fault is attributable,) upon the principle, that where parties stand equally fair in every respect, the actor who brings the other into court, ought to pay the expense. [Catlin v. Harned, 3 Johns. Ch Rep. 61.] As the litigation here was such as the guardian might well move in, to relieve himself from an unjust burthen, these costs will also be adjudged to be paid from the lunatic's estate.

HOLT v. MOORE.

1. A parol, contemporaneous agreement cannot be permitted to vary a contract in writing, or change its legal effect.

ERROR to the Circuit Court of Pickens.

Holt sued Moore, on his indorsement of a promissory note, given by E. H. Moore & Co., to the defendant in error, for the sum of $3,882 27-100. The declaration is in the usual form. For his defence, the defendant in error, who was defendant in the court below, relied on a plea, setting forth, that his indorsement of the note in the declaration mentioned, is subject to the following condition, to wit: it was agreed and understood between the said E. H. Moore & Co., Thomas Holland, agent of Holt, Rose & Gibson, for whose benefit said note was made, and the said de-

fendant, that if the said defendant would endorse said note, that an amount of avaible notes and accounts due to E. H. Moore & Co., on solvent persons, should be placed for collection, in the hands of said defendant, sufficient to pay off and satisfy the sum of money in said note specified; and that beyond the amount of such available notes and accounts on solvent persons, which said defendant should so receive, he should not be bound or liable on his said indorsement; and defendant avers that a sufficient amount of available accounts and notes, due to said E. H. Moore & Co., had not been placed in his hands for collection, to pay off and satisfy the said sum of money, in said note specified.

To this plea, the plaintiff demurred—the court overruled the demurrer, and gave judgment for the defendant; to reverse which this writ of error is prosecuted, and the judgment overruling the demurrer, is now assigned for error.

W. Cochran, for plaintiff in error.

CLAY, J.—The only question presented for determination in this case is, whether the defendant could set up, by way of defence to the plaintiff's action, a parol agreement, which seems to have been contemporaneous with his indorsement, to vary or change its legal effect. The defendant indorsed a promissory note in the ordinary mode; the note came into the hands of the plaintiff, who is not even shewn to have been a party to the contract when the note was made—he has sued the defendant upon the indorsement, and the defendant now seeks to defeat his recovery, by showing that the makers of the note were to have placed in his hands a sufficient amount of available notes and accounts to satisfy said note.

The same question has been repeatedly decided by this court, and so far as I have seen, uniformly in the same way. In the case of Somerville v. Stephenson & Johnson, [3 Stewart, 271,] substantially the same question was presented. In that case, the defendants in error offered to prove, in the court below, that at the time of the assignment, it was agreed, as set out, they should wait two years with the obligor of the specialty, and that if he did not pay them, that the plaintiff in error would be responsible. The court said, the bill of exceptions taken to the opinion of the court below, overruling an objection to the testimony, raised the

question: "Is it competent to vary a contract in writing, by a verbal agreement, made at the time the contract is entered into, and is such the effect of the testimony, with regard to the indulgence of the obligor?" And, after an elaborate review of the authorities, the court came to the conclusion, that the court below erred in admitting the evidence offered. The same question had previously been presented in the case of Duprey v. Gray, [Minor's Reports 357,] and in the case of Wesson v. Carroll, ib. 251, in each of which, the court held the same doctrine. Such would seem to be the established rule, between the parties to the original contract; but in this case, the note has gone, by the payee's general indorsement, into the hands of a third person, who may have been ignorant of any such condition as the plea sets out, if it was agreed on. The demurrer should have been sustained.

Let the judgment of the court below be reversed, and the cause remanded.

CALHOUN, BY HIS NEXT FRIEND, v. KING, ET AL.

1. When a trust fund is in danger of being wasted or misapplied, a court of chancery will interfere at the instance of those interested in it, and by the appointment of a receiver, or in some other mode, prevent the destruction of the fund. This rule applies to executors and administrators, as to all other trustees.
2. Where one administered on an estate in Georgia, in 1826, and some ten or twelve years since came to this State, bringing with him the minor distributees, and the property of the estate, and died in possession thereof; and the property being about to be sold for the payment of his debts, a court of chancery may interfere by injunction, at the instance of a minor distributee, and prevent the sale of the property, although it is not shown that the surety to the official bond of the administrator in Georgia is insolvent.
3. In such a case, if no settlement has been made by the administrator with the probate court in Georgia, the court of chancery has power to ascertain the amount in the hands of the administrator, subject to distribution, and the amount or value of the distributive share of the complainant.

ERROR to the Chancery Court of Talladega.

The bill was filed by the plaintiff in error, and charges that about the year 1826, David Calhoun, a citizen of Franklin county, Georgia, died intestate, leaving a large real and personal estate, amounting to twenty thousand dollars; that at his death he did not owe more than three hundred dollars; that he left a widow and two children—the complainant and John C. Calhoun, since dead; that administration of his estate was granted to his widow and one William King, who by virtue thereof took all the property into their possession, and not long after intermarried; that King disposed of all the property, real and personal, except the negroes, six in number, and with his wife, removed to Talladega county, bringing with them the whole of the personal property of said deceased, and the two infant children (complainant and his brother,) where he remained until his death some two years since, disposing of the money and property thus acquired, as his own; that King departed this life, leaving his widow and John C. Calhoun his executors, to whom letters testamentary were granted; that John C. Calhoun also departed this life, and the letters testamentary to the widow being revoked, administration *cum testamento annexo*, was granted to David A. Griffin, then sheriff, as also letters of administration on the estate of John C. Calhoun; at the expiration of his term the administration devolved on Spence, his successor in office, who, it is alledged, is permitting the property to be sold for the payment of King's debts.

The prayer of the bill is, that the slaves be decreed to the complainant, and also for general relief; and a prayer for injunction, &c. which was granted.

The chancellor, on motion, dismissed the bill for want of equity; from which decree the complainant prosecutes this writ, and assigns for error, the dismissal of the bill, and also that the court erred in not permitting the complainant to amend his bill.

L. E. Parsons, for plaintiff in error.—The court should have permitted the amendment to be made. [Bryant v. Peters, 3 Ala. 160.] The chancellor erred in supposing the bill filed to compel a foreign administrator to account; it is an equitable claim, asserted by a minor, founded on a breach of trust, of which chancery has jurisdiction, whenever it has jurisdiction of the person or property; and that a court of chancery will interfere in this case to prevent irreparable injury. He cited 7 Cow. 64; 4 S. & R.

389, 392; 9 ib, 252, 259; 2 W. C. C. Rep. 337; 2 Stewart, 47; 12 Peters, 11, 18.

Moody and Rice, *contra*—argued that the decree was right, because it was not alledged in the bill that a final settlement had been had in the State of Georgia; that it did not appear that the security upon the administration bond was not good; that the ordinary has exclusive jurisdiction, and there must always be some one to represent the estate, who may be sued. They cited Story's Confl. of Laws, 421, 450; Aik. Dig. 176, 179.

ORMOND, J.—It is an established rule of the court of chancery, that where a trust fund is in danger of being wasted or misapplied, it will interfere, on the application of those interested in the fund, and by the appointment of a receiver, or in some other mode, secure the fund from loss. This rule applies with full force to executors and administrators; in such cases, the jurisdiction of chancery, in this country, is concurrent with that of the orphans' court, and acts in aid of, and as ancillary to it. [For the general principle, see Story's Eq. 2 vol. § 836, and cases cited.]

The allegations of this bill establish, conclusively, that the trust fund is in the most imminent danger of being entirely wasted, or placed beyond the reach of the *cestui que trust;* as the slaves are about to be sold to pay the individual debts of King, the administrator; and if the court of chancery cannot act, no power exists to prevent the total loss of the trust fund.

The obstacle to the action of the court is supposed to be found in the fact that King received the slaves in virtue of power derived from the probate court in the State of Georgia, and that he is only amenable there, nothwithstanding he has brought the property, and the *cestui que trust*, to this State.

It cannot be doubted that an executor or administrator, as such, has no power to sue *extra territorium*, nor is he subject to suit, even, it has been said, where he brings with him into another country, the assets received in the country from which he obtained his appointment. This latter principle has however, been denied to be law in the case of Campbell v. Toucey, [7 Cow. 64,] where it was held that he might be sued as executor, *de son tort.* [See also Danby's executors v. Edwards, at the last term.]

Conceding the law to be as above stated, we do not perceive

that it militates against the relief here sought, even supposing the proper inference to be, that the administrator has never settled his account with the court of ordinary in the State of Georgia. This is not a suit against the administrator for a debt due from the estate, but it is an assertion of title to the property itself, which being found in this State, will give the court jurisdiction; and if it were clear that the estate was not finally settled, a court of chancery in this State, the property and the parties all being here, would have the power to interpose and prevent the destruction of the fund until the settlement could be made. [Cruikshank v. Roberts, 6 Madd. 104.]

It appears, however, that the father of the complainant died in Georgia, in 1826; that in that, or early the succeeding year, the mother of complainant and one King, administered on the estate, and took possession of all the effects, real and personal, of the deceased—that about the year 1830, (as appears from the answer) King, having married the mother of complainant, removed to this State, bringing with him all the property of the deceased, and the complainant and his brother, both minors. King has since died without making any settlement with the complainant, and the property is now claimed, and about to be sold for the payment of King's debts.

It is certainly true, that until the debts of the deceased are paid, the heirs have no right to call for distribution; but it is not creditors who are now objecting, nor is any objection set up in their behalf; nor indeed can it be presumed, that any are now in existence; but on the contrary, the presumption, after such a lapse of time and removal of the property into this State, should be that the estate has been settled. The objection, is in effect, made by the administrator himself, who has removed the effects of the estate from the country where the settlement should have been made, and now urges that as a reason why he should not be prevented from wasting the property.

It is also urged that the security, which it must be presumed was taken by the probate court in Georgia, must, as there is no allegation in the bill to the contrary, be considered an adequate protection to the complainant. We cannot agree that the surety to the administrator's official bond, is the only security which those interested in the trust fund have for indemnity against loss. The experience of every day, admonishes us, that it frequently

fails of producing this result; and in a case like the present, where he bond must have been taken some fifteen or sixteen years since, and the surety, if living at all, resides in another State, we think it cannot be doubted that the complainant has a right to the interposition of this court, to prevent the destruction of the fund, without being compelled to rely on the doubtful security afforded by the official bond.

The bill is certainly exceedingly inartificial, if not defective; but we think it should not have been dismissed for want of equity. It does not state whether any settlement was made by King in Georgia; the assets which came to his hands, or the debts which he paid, or the amount in his hands, subject to distribution, except so far as it may be gathered from the allegation that all the property remaining in specie, is not more than sufficient to satisfy the complainant's distributive share. In these and other particulars which might be mentioned, the bill should, on motion of the complainant, have been amended, especially in a case where an infant was the complainant. As to the duty of the court in permitting amendments, see Bryant v. Peters, [3 Ala. Rep. 160.]

As the cause must be remanded, it may be proper to state that if the fact should turn out to be, that no settlement of the estate was ever made in Georgia, that the court of chancery having rightfully obtained jurisdiction of the cause for one purpose, may retain it for all purposes. It could subserve no rational purpose, nor benefit any of the parties, to suspend the proceedings until a formal settlement of the estate was made in Georgia, as the basis for the future action of the court of chancery. We think, therefore, that the court has power to ascertain the amount in the hands of the defendant, as representative of King, subject to distribution, and also the amount or value of the distributive share of complainant, as heir of his father and brother, and decree accordingly. For this purpose, let the decree, dismissing the bill, be reversed, and the cause be remanded.

JOHNSON, ET AL. v. J. & B. F. PETTY.

1. In summary proceedings against a constable and his sureties, for money collected on execution, the circuit or county court has jurisdiction, where the amount in controversy exceeds fifty dollars; and the notice in such case may be directed to the sheriff to be served.
2. It is no objection to a notice issued to a constable and his sureties, preparatory to a motion against them, to recover money collected by the former on execution, that instead of setting out the first names of the plaintiffs at length, the initials only are stated.
3. Where the record recites that an issue was tried, without disclosing what the issue was, the legal intendment is, that it was a mere denial of the allegations of the plaintiff.
4. In a proceeding against a constable and his sureties by notice, to recover money collected by the former on execution, the plaintiff is not entitled to recover, upon proof that a constable had levied an attachment in his favor, and that the defendant therein had placed in the constable's hands, money, or property, to indemnify him for a liability incurred by the failure to take a replevying, or bail bond. Perhaps an action would lie in such case for a breach of official duty.

WRIT of Error to the Circuit Court of Barbour.

This was a proceeding under the statute, at the suit of the defendants in error, to recover of the plaintiffs the amount collected by Johnson, as constable, on an execution issued by a justice of the peace of Barbour, in favor of the plaintiffs below, against John Davis, for the sum of forty-nine dollars and sixty-eight cents, besides costs. The notice is addressed to the defendants, the first of whom is described as a constable, &c., and the two latter as the sureties in his official bond; it informs them, that the Circuit court will be moved, for judgment against them, for the amount of the execution, debt, interest and costs, and also the damages allowed by law, for the failure to pay, on demand, the money collected.

The defendants moved the court to quash the notice, 1, because it was not properly directed; 2, because it does not allege that the money was collected by Johnson as a constable; 3, because it does not show under what statute the proceeding is had, or the amount of damages claimed. This motion was over-

ruled, and the case was thereupon tried by a jury on issue. On the trial the defendants excepted to the ruling of the court. It was proved that an attachment had issued in favor of the plaintiffs against Davis, and afterwards an execution was issued on a judgment rendered on the attachment; that the attachment was levied by Johnson as a constable, but Davis removed the property attached without giving bond; Johnson pursued him to another State, and there Davis made him satisfaction for his liability on the attachment; all which occurred previous to the time the execution issued. Under these facts, the defendants, by their counsel, moved the court to instruct the jury, that if they believed the money (if any) was paid on the attachment before the execution issued, they must find for the defendants; which charge was refused, and the court instructed the jury, that if they believed the money was paid by Davis to Johnson, either on the attachment or execution, they must find for the plaintiff, without inquiring on which it was paid. A verdict was returned for the plaintiffs, and a judgment was thereupon rendered.

WILEY, for the plaintiffs in error.

G. GOLDTHWAITE, for the defendants.

COLLIER, C. J.—The act of 1826, "to authorize sheriffs to serve notices," conferred upon that officer the power to execute all notices that may be necessary and proper in any suit in chancery, or in the circuit or county courts. [Aik. Dig. 280.] The statute of 1824, under which this proceeding was instituted, gives to the two last courts jurisdiction of a case of this character, where the amount sought to be recovered exceeds fifty dollars. There can then, be no doubt that the plaintiffs very properly addressed their notice to the sheriff to be executed.

In respect to the second objection to the notice, that it does not set out the first names of the plaintiffs at length, we think it also unavailing. They are, it is fair to suppose, described by the name in which they do business together, and most probably designated as they were in the execution against Davis. At any rate, their names are set out in such a manner as to enable the defendants to understand who they are called on to answer.

The third objection is not sustained by the record, for it is explicitly alleged that the money was collected by Johnson, as a

constable, in virtue of the execution, &c. If there were more statutes than one, on which a motion of this kind could be made in the Circuit court, then the notice should state under which it was made, but it being authorized alone by the act of 1824, [Aik. Dig. 175,] the defendant could not have been misled, but must have looked to that statute as prescribing the mode of procedure, and the measure of the recovery. This view disposes of the objections to the notice, and shows that they were rightly overruled.

The notice informs the defendants below that the plaintiffs will move for a judgment for the failure of Johnson to pay over the amount of an execution collected by him as constable. An issue was tried, which, as its terms are not shown by the record, must at least be intended to have been a denial and re-affirmance of these facts. This being the case, it was clearly incumbent on the plaintiffs to prove that if any money had been collected by Johnson, that it was received by him under the authority of the execution. Proof that he had levied an attachment, and that the defendant therein had placed in his hands money or property, in order to indemnify him for a liability incurred by the failure to take a replevying or bail bond, did not support the allegations of the notice, and could not, even according to the liberal rules of pleading, have authorized a recovery. But this is a case *strictissimi juris*, the statute under which it was commenced is exceedingly penal, inflicting upon the constable and his sureties for the breach of duty alleged, damages on the amount collected at the rate of *ten per cent. per month*, up to the rendition of the judgment, and five per cent. per month thereafter till paid. It is needless to extend the consideration of this point to greater length, as we have repeatedly held, that an officer is not liable by motion, under the statute for a failure to pay over money collected, unless it was received in virtue of process in his hands, and in full force. Here, it is clear that money was not collected on the execution; the attachment did not authorise its collection; and even if it did, it was not paid to satisfy the plaintiffs demand, but to indemnify the constable. Johnson may have been liable to an action for a breach of duty, and the money or property received from Davis may perhaps have been recovered from him in some other proceeding. In refusing to instruct the jury as prayed, and in the charge given, it will follow from what has been said that the Circuit court erred. Its judgment is consequently reversed, and the cause remanded.

PLANTERS' & MERCHANTS' BANK OF MOBILE v. BORLAND.

1. An issue for the trial of the right of property, under the act of 1812, [Aik. Dig. 167] is a suit at law, within the meaning of the 21st rule of practice in chancery, [1 Stewart's Rep. 618,] and the plaintiff in execution is bound, on the suggestion and affidavit of the claimant, to elect between the dismission of such case, and a bill in chancery for the same claim or demand.
2. The objects of the rule were to diminish litigation, and lessen its expense, and the claimant may, at the earliest moment after the two suits in law and chancery are commenced, for the same claim or demand, make his suggestion, and call for the election of the plaintiff.
3. The powers of the courts of law and chancery are concurrent, over such applications—and the tribunal first applied to may act.
4. A deed, or conveyance, for the absolute sale of property, which is fair upon its face, cannot be excluded from the jury, notwithstanding there may be facts in evidence, which might shew it to be fraudulent in legal contemplation: when the evidence of fraud is not disclosed by the deed itself, but furnished by parol evidence in connection with it, it becomes a mixed question of law and fact, and a jury must interpose.
5. Payment of drafts, or checks, and in some cases, payment of judgments or executions, may be proved by parol evidence, without producing such written or record evidence, or accounting for its absence—the necessity of producing such evidence, exists when the deed, agreement, &c., form part of the issue, or become material to the issue.
6. On the trial of an issue, whether certain property levied on by an execution in favor of P. M. B, v. J. H. W, it is not material whether J. H. W, was principal, or security in the note, on which the judgment is founded, he being equally liable to the plaintiff, in the execution, whether he was one or the other, and evidence to prove his securityship may be rejected.
7. As a general rule, a witness can only depose to facts *within his own knowledge* and he cannot be permitted to speak of the *intentions* or *thoughts* of another, either positively, or as to his own opinion or belief.
8. Where a sale of personal property is absolute, and possession remains with the vendor, and there is no proof of circumstances to explain why possession did not accompany and follow the sale, the vendor being insolvent, in legal contemplation, the evidence of fraud is conclusive.

ERROR to the Circuit Court of Lowndes.

The Planters' and Merchants' Bank of Mobile, having some time before obtained a judgment against George Walker, Robert

Lowe and John H. Walker, for $6,464 10-100, caused an execution to be levied by the sheriff of Lowndes county, on a large number of slaves, as the property of said John H. Walker, about the 15th June, 1842. Abram Borland filed his affidavit, claiming said slaves, as his property, and gave his bond with security, for the trial of the right thereof, conformably to the statute, in such cases made and provided. An issue was afterwards made between the plaintiff in execution and said claimant, which came on for trial before the circuit court of Lowndes county, at its spring term, 1843.

Before the trial of said issue, the record shows the parties appeared by their attorneys, and the claimant suggested to the court on affidavit filed, that this suit, by plaintiff, is for the same claim or demand, to recover which, the said plaintiff has filed a bill in the chancery court of said county against the claimant and others, and moved the court to inspect the records in this cause, and the bill filed as aforesaid; and it having appeared to the satisfaction of the court, after inspecting the records in the said courts of law and chancery, that the matters embraced and involved in this suit, are also, amongst other matters and claims, embraced and involved in the suit in chancery. It was ordered that said plaintiff elect, in which suit he will proceed, and that he dismiss the other, so far only as the matters embraced and involved in this suit, are involved in the suit in chancery. This order of the court was resisted, on the following grounds; that this was not the kind of case, between which and a suit in chancery the rule applied as the claimant by filing his affidavit, bond, &c., brought on the controversy, against the wishes of the plaintiff in execution; that the suits were for objects essentially different, as well as the parties, and interests sought to be reached; that the defendants had not answered the bill in chancery; and that the claimant ought first to answer whether he would go to trial. By agreement of the parties, the bill alluded to has been brought up with the record in this case, for the inspection and consideration of the court. Under the direction of the court, the plaintiff then dismissed his bill, so far only as the matters embraced in this case are involved in the chancery cause.

In the progress of the trial, various questions arose, which are disclosed by a bill of exceptions, then tendered and signed and sealed. It appears the plaintiff introduced evidence to show that

during the years 1839, 1840, and 1841, as well as before and since, John H. Walker, the defendant in execution, and the son-in-law of the claimant, (who claims the property levied on under a purchase from said Walker) remained in the uninterrupted possession and control of the slaves in controversy, and the plantation, on which they were employed—and, during that time, was the only visible possessor of said slaves, and exercised all the usual acts of ownership over them. The plaintiff also introduced evidence, that the claimant in the spring of 1842, requested the witness to go with him and see him receive possession of the slaves in controversy, which, he said he had purchased of John H. Walker, the defendant in execution; which witness declined doing. The plaintiff also proved the separate value of the several negroes, levied on; that John H. Walker, the defendant in execution was insolvent, and that there were unsatisfied judgments against him to a large amount.

The claimant then proved by the subscribing witness, that the claimant, Borland, and John H. Walker had acknowledged before him their signatures to an instrument of writing, which was offered as evidence to prove the claimant's title to the slaves therein mentioned, of which instrument, with the P. S., and endorsements thereon, the following is a copy:

"Contract between A. Borland and John H. Walker, both of Lowndes county, Ala. John H. Walker, has this day sold to Abram Borland, his tract of land in the county of Dallas and Lowndes, consisting of about five hundred and ninety acres, more or less; also, all his negroes, say sixty-eight in number, little and big; and his stock of horses, hogs and cattle, household furniture, pleasure carriage and plantation tools, and the growing crop of the present year, for and in consideration of the sum of thirty-seven thousand dollars, to be paid in the following manner, viz: the said Borland is to pay, or cause to be paid, to the Branch of the Bank of the State of Alabama at Montgomery, all the notes, bills and judgments, said Bank holds against said Walker as principal, amounting to about fifteen thousand dollars, with interest from June, 1838. He is also to pay to Messrs. Bull & Files the sum of three thousand dollars, which they have advanced or accepted for said Walker, out of the growing crop now on said land or plantation. He is also to pay to James B. Robinson, the overseer on the plantation, the sum of five hundred dollars, and

the sum of five hundred dollars to Mr. Claughton and King, who worked for said Walker this spring, and hold his notes for the amount, and the balance of the purchase money to be divided into equal instalments: that is to say, said Borland is to give his notes in the following manner—a note for twenty-two hundred dollars, payable on the first of March, 1847, one for twenty-two hundred dollars, payable on the first of March. 1848, and another for twenty-two hundred dollars, payable on the first of March, 1849, and one other for the sum of twenty-two hundred dollars, payable on the first of March, 1850, and another note for twenty-two hundred dollars, payable on the first of March 1851.

Signed, J. H. WALKER,
ABRAM BORLAND, sen'r.

Signed in the presence of
J. B. MAY

P. S.—And another note payable on the first of March, 1852, for two thousand dollars, this 27th day of Sept. 1840—not signed, and then follows a list of the negroes, except some children, whose names are not given."

The plaintiff's counsel moved to exclude said instrument from the jury, on the ground, that under the evidence introduced by the plaintiff, and then before the court, including the record of the plaintiff's judgment, issuance and returns of executions under it, it sufficiently appeared that this was a pre-existing debt; that the vendor, Walker, was then in failing, or insolvent circumstances, and that being in such situation, such a conveyance by him as that above set-forth, from the long time of credit given, and other indications accompanying it, was, on its face, fraudulent and void, as against creditors. This motion was overruled by the court.

The plaintiff, also moved to exclude from the jury, the deposition of Bull & Files, which went to prove, amongst other matters, that they had, at claimant's request, paid certain drafts and acceptances against said John H. Walker, *said drafts and acceptances not being introduced nor exhibited, nor their absence accounted for.*

The claimant having offered the evidence of one Branch, a constable, to prove payment of a certain sum of money by the claimant on some judicial process, against said John H. Walker, the plaintiff moved to exclude it, *on the ground of immateriality,*

and *the process not being introduced*—but was overruled by the court.

In like manner, the plaintiff moved on the ground of irrelevancy, to exclude the evidence of one May, a deputy sheriff, who swore he levied an execution on the property of said John H. Walker, that the entries made thereon were correct, and the execution was offered to the jury to prove it operated as a lien on said Walker's property; but was overruled by the court.

The plaintiff also moved to exclude another execution, on the same ground, in favor of one Gilchrist against said Walker, accompanied by evidence, that it too, was a lien on his property—but was overruled.

George Walker, another defendant in said execution, was introduced as a witness, by the claimant; on cross-examination, the plaintiff called on him to state whether, notwithstanding he and John H. Walker purported to be securities in the note on which this judgment is founded, for J. B. Wilkins, said Wilkins had not, by agreement between them, transferred some ten negroes, and notes to the amount of about $20,000, to meet this and other debts, and if part of the money and proceeds, and how much had been realized—the avowed object being to show, that said J. H. Walker had in fact become a principal in the debt, and evidence having previously transpired, on the the trial, tending to show, that claimant had agreed in said contract with said John H. Walker, to pay all his debts, as the consideration of said purchase. This evidence was objected to, and excluded.

The plaintiff also moved to exclude the evidence of J. B. Wilkins, who was introduced by claimant, to prove that claimant had paid a certain debt for said J. H. Walker, *on the ground that it was a judgment debt*, on which he, Wilkins stood as principal, and said Walker and others, securities, but the court refused to exclude the evidence.

The claimant having introduced several witnesses tending to prove that he had paid for the slaves purchased under said contract, by assumptions of said John H. Walker's debts—the plaintiff offered to prove, that at the time claimant assumed a certain debt to one Stewart for said Walker, he, the claimant was indebted to the said Walker in a much larger amount, because that said witnesses' means, he having been principal in the debt, had, by arrangement with said Walker, been placed in the hands of

said Walker to pay, or arrange this debt—these facts were proposed to be proved, as circumstantial evidence, that Borland had already, and without the conveyance of said negroes, been compensated for the assumption of said Walker's debts—also, to prove by said witness, that Borland's assumptions of said Walker's debts were voluntary; but said evidence was excluded by the court.

Claimant then called on said Walker to testify, and asked him if, in the said contract between himself and said claimant, they intended to defraud the creditors of said Walker—to the admission of which evidence, the plaintiff objected, but was overruled by the court, and the witness permitted to say, "no fraud was intended in said contract—that such a thing was never thought of by either." Yet said witness admitted, that at the time of making said contract, he was insolvent, and debtor to the amount of $80,000—$15,000 or $20,000 of which was then in judgment; that he sold his property to avoid its sacrifice under execution; all which was excepted to.

By an agreement in writing, signed by the counsel for the plaintiff and defendant in error, to be taken as part of the record in this case, it is admitted that the claimant introduced evidence, tending to prove, that after the purchase, he had paid the overseers in charge of the property, in 1840 and 1841.

That the testimony of Bull & Files, contained no further description of the debts paid by claimant, than that they were drafts and acceptances by them for said Walker, and paid by the claimant.

That the testimony of W. S. May was introduced to shew, that five of the negroes bought by claimant, were sold by him as deputy sheriff under the executions, and that Borland had paid part, and how much, on said executions; and the same as to the executions of Gilchrist.

That claimant also offered evidence, to prove, that he had settled, in money, by his notes, or otherwise, all the debts mentioned in the contract of purchase to be paid by him—and that he had settled or assumed in writing, other debts to a considerable amount, part in money, and part in notes transferred, or substituted by him, and part by giving his own notes—*that the debts thus discharged, were discharged by the directions of Walker.* Walker testified that he sold the property to Borland, because he

thereby secured the payment of $37,000 of his debts, when, if the property had been sold by the sheriff, it would have been sacrificed, and would not more than have paid the judgments against him, and that he did not communicate to Borland the existence of the unsatisfied judgments and executions.

That there was evidence tending to prove, that the price agreed by the contract of purchase, to be paid, was more than the value of the property bought; and there was no evidence that Walker had ever received any portion of the purchase money, except as shown above.

And that there was no evidence of any other contract ever having been made between claimant and Walker, for or concerning the slaves levied on, than that stipulated in the written contract, herein before stated.

Before the jury retired, the plaintiff's counsel requested the court to charge them, that if, under the terms of the written contract, between said claimant and said John H. Walker, there was no change of the possession of the property, and if no special circumstances were proved, to explain why the possession did not accompany and follow the sale, and the said vendor was then insolvent—"then the failure to transfer the possession was conclusive evidence of fraud," as against the plaintiff in the execution, and the property liable to condemnation.

The court refused so to instruct, but charged the jury, "that the above was a circumstance only, from which the jury might infer fraud, unless there were other circumstances in evidence, which, in their opinion, were sufficient to outweigh this presumption, in which latter event, they should not so regard them."

The plaintiff's counsel then requested the court to charge the jury, that the long credits given in this case, in connection with the discrepancy, as to the amount of the price, contracted to be given; and the other indications of fraud, apparent on the face of the contract, in addition to the circumstances referred to, in the instructions as above requested, were sufficient of themselves, to render said contract frudulent and void in law, as against the plaintiff—inasmuch as the parties must be presumed to intend that, which must inevitably result from their acts; which instructions were refused, and plaintiff's counsel excepted.

The jury found a verdict for the claimant, and the court rendered a judgment accordingly—to reverse which, this writ of

error was prosecuted, and the plaintiff now assigns the following errors:

Planters' and Merchants' Bank of Mobile, pl'ff in ex'n, vs. Abram Borland, claimant. } Sup. Court, June Term, 1843. The plaintiff in error, comes and says, that in the record and proceedings in this case there is manifest error, and for causes assigns the following:

1. The court below erred in requiring and ordering the plaintiff in error, on motion of defendant, to elect between this case, and the suit in chancery alluded to, and disclosed by the transcript of the record, in which said plaintiff would proceed, and to dismiss the other; and in the time and manner of ordering and compelling the election to be made as shewn by the record.

2. The court erred in not excluding from the jury, the paper purporting to be a contract or conveyance of the property, real and personal, of John H. Walker, one of the defendants in execution, to the defendant in error, signed by each of them, and bearing date, 27th September, 1840, and attested by J. B. May, as shewn by the bill of exceptions.

3. The court erred, in admitting as evidence, the depositions of Bull & Files; and also in admitting the evidence of the witness Branch, under the circumstances, and after objections by the plaintiff as stated and shewn in the bill of exceptions.

4. The court erred in overruling the objection of the plaintiff to the admissibility of the evidence offered, of the witness May, relating to executions and the liens thereby created on the property of John H. Walker, defendant in execution, under the circumstances, and as stated in the bill of exceptions.

5. The court erred in excluding the evidence of George Walker, which the plaintiff offered to elicit on cross-examination, after said Walker had been introduced and examined on the part of the defendant, as stated and explained in the bill of exceptions.

6. The court erred in refusing to exclude the oral evidence of the witness J. B. Wilkins from the jury, which related to the payment of a judgment, and in the absence of any higher evidence of the existence of such debt, or the fact of the payment having been made.

7. The court erred in rejecting the evidence proposed to be introduced by the plaintiff on cross-examination of the defendant's

witnesses, with a view to shew, that defendant had been compensated for certain payments by him of John H. Walker's debts to Stewart and others; and this after defendant had introduced evidence of the same witnesses, tending to prove that he had paid for the slaves in contest, by assumptions to pay the same debts, as shewn by the bill of exceptions.

8. The court erred in admitting the evidence of John H. Walker, defendant in execution, at the instance of defendant in error, stating by general assertion, that no fraud was intended in the contract of sale of said slaves, between himself and said claimant—that such a thing was never thought of by either, &c., as stated in the bill of exceptions.

9. The court erred in refusing to instruct the jury, as requested, by the plaintiff in the first instructions moved, and in the contrary instructions given, as stated in the bill of exceptions.

10. The court erred in refusing to instruct the jury as requested in the second instructions, moved by the plaintiff, as stated and shown by the bill of exceptions.

R. Saffold and Geo. W. Gayle, for the plaintiff in error.
Williams and Elmore, *contra.*

CLAY, J.—1. The first question presented by the assignment of errors is, whether the circuit court erred in requiring the plaintiff in the execution to elect between the further prosecution of this case, and a bill in chancery, which involved the question of title to the same property? The answer to this question depends, mainly, upon our own rule, applicable to the subject, and the practice which has prevailed under it. The rule is in these words:

"Where a suit at law and a bill in chancery are instituted for the same claim or demand, the defendant, on suggestion, supported by affidavit, may move the court to inspect the records; and, if it appear that the two suits are for one and the same cause of action, it shall be ordered that the plaintiff elect in which he will proceed, and that he dismiss the other."

In opposition to the enforcement of this rule, by the court below, it was insisted, that this was not the kind of case at law, contemplated in the adoption of the rule—that it was not an action, originally, brought by the plaintiff, to recover the property in controversy—but that the issue had been forced upon him by

the claimant. It is true, this is not a common law action to recover the property—but the plaintiff, by causing his execution to be levied on it, as effectually asserts that he is entitled to its value, under the claim, created by his judgment, as he could have done by bringing an ordinary action at law. The claimant comes in, and denies the plaintiff's right to the property, to satisfy his execution—and, under our statute, an issue is required to be made up between the parties, which as effectually tries the title, as it could be tried in an action of trover, or detinue. The proceeding on the part of the plaintiff may be regarded as a *statutory* action, in which the leading process is the execution—the levy being made, and affidavit and bond being filed by the claimant, the "court shall require the parties concerned, to make up an issue, under such rules as they may adopt, *so as to try the right of property before a jury at the same term*, &c." We, then consider the proceeding in the court below as "a suit at law," within the fair interpretation of the rule.

So far as regards the proper "suggestion, supported by affidavit," that the suit at law and the suit in chancery were "instituted for the same claim or demand," there is no room for controversy. The court below inspected the records and so determined—and the bill filed by the plaintiff in chancery, does seek to set aside a conveyance between the same parties, for the same consideration, for the same number of slaves, and the same description of other property, which is embraced in the contract, the validity of which was brought in question by the issue at law—and each proceeding is the same, as to the subjection of the property to the satisfaction of the plaintiff's demand. It is true, that other objects, and other parties are embraced by the bill in chancery—but so far as concerns the property levied on, the object to be attained, and the parties interested, are the same, and no other rights, or interests can be affected by the order of election, for the court below required the dismission of the suit in chancery, "so far only as the matters embraced and involved in this suit, are involved in the suit in chancery."

The objects of the rule under consideration were to diminish litigation, and lessen the costs and expenses incident to it, by declaring that the same claim or demand, should not be, at the same time, the subject of a suit at law, and another in chancery. Regarding these considerations, and the language of the rule, that

the election *shall* be ordered "where a suit at law, and a bill in chancery are *instituted* for the same claim or demand"—it cannot be doubted that the defendant may, at the earliest moment, after the two suits are commenced *for the same claim or demand*, make his suggestion; and that the powers of the courts of law and chancery, over such applications, are concurrent, to be exercised by that tribunal, before which the suggestion of the identity of the claim, or demand sued for in the two jurisdictions, shall be first made. In the case of Doe, *ex dem.* Duval's heirs v. McLoskey, [1 Ala. Rep. N. S. 708,] this rule came under revision, and although the precise point, raised here, was not presented in that case, it is believed the construction now given it, is in perfect harmony with the views then expressed.

2. The claimant having introduced as evidence, a contract in writing, between himself and John H. Walker, purporting to be an absolute sale, by the latter to the former, of about 590 acres of land, "all his (said Walker's) negroes, say 68 in number, little and big, and his stock of horses, hogs, cattle, household furniture, pleasure carriage and plantation tools, and the growing crop of of the current year," in consideration of $37,000, about $15,000 of which were to be paid to the branch bank at Montgomery, $3,000 to Bull & Files; about $1000 more to different individuals, and the balance by annual instalments of $2200 each, the first payable on the 1st of March 1847, and the balance payable annually thereafter, extending to March 1852, the plaintiff moved the court to exclude this contract from the jury, on the ground, that under the evidence introduced by the plaintiff, and then before the court, including the record of the plaintiff's judgment and issuance and returns of executions under it, it sufficiently appeared that this was a pre-existing debt—that the vendor, Walker, was then in failing circumstances, and that being in such situation, such a conveyance by him as that above set forth, from the long time of credit given, and other indications accompanying it, was, on its face, fraudulent and void, as against creditors. This motion was overruled by the court, and that opinion is the ground of the plaintiff's second assignment of error.

There is no question, that the facts being fully ascertained, fraud is a question of law. It was so held by this court in the case of Swift v. Fitzhugh, [9 Porter, 67.] The court then said, "fraud is a question of law, though from the manner in which

cases are usually presented in court, it must, in general, be left to the jury to determine. But when the facts are clear and undisputed, the question of fraud, or not, is a pure question of law." [1 Bur. Rep. 395; 9 Johns. Rep. 337.] In the case of Ashurst v. Martin, [9 Porter 571,] this court said: "It is settled beyond controversy, that a debtor in failing circumstances, may convey all his property, in trust to be equally divided amongst his creditors, if the property be fairly and honestly devoted to this purpose, untramelled by onerous conditions upon the creditor, and without stipulating for any pecuniary benefit to himself, as the consideration on which the creditor shall be allowed to participate in the assignment." In the same case, [p. 572,] it was further held "as well settled, that the debtor may give a preference to particular creditors, and declare that such may be paid their entire demand, &c." And we may lay it down as equally unquestionable, that if a man think proper, he may sell his entire estate, real and personal, at the same time, and to one individual; and such a contract, on its face, would not, necessarily, be fraudulent. Apply these principles to the contract before us, and on its face, it purports to be an absolute sale of a certain quantity of land, all the grantor's slaves, his horses, hogs and cattle, household furniture, pleasure carriage, plantation tools, and growing crop, for a certain consideration, which, if not fully adequate, is certainly not revolting for its inadequacy—and directs certain debts to the Montgomery branch bank, and to certain individuals to be paid, the balance to be secured by notes, payable to himself, for certain sums annually. The contract does not show that the grantor owes any other debts, consequently, there is nothing to render it improper, that the balance of the consideration money should be paid to himself. On its face, it is a plain bargain and sale of property; and as regards land, and some other descriptions of property, it does not appear to be all the grantor owned—nor does it show, of itself, that the interest of any one, was either injured, or intended to be injured; consequently there is nothing in the contract itself, to authorise the conclusion that it was intended to defraud, delay, or hinder creditors. The counsel for the plaintiff, however, relies on the evidence of his judgment and several executions, as proving a pre-existing debt, and the further evidence that the vendor was in failing or insolvent circumstances; and that the long credits given for the purchase money, with the other

circumstances attending the transaction, rendered the contract fraudulent and void, as against creditors, and that the court ought so to have considered it, and have wholly excluded the contract from the jury. But to have pursued such a course, the court must have passed on the *credibility*, as well as the *weight* of the evidence, tending to establish the facts, or conclusions insisted upon; they were not ascertained by the contract, and it was the peculiar province of the jury to determine, whether the testimony was credible, and whether it was sufficient to establish such facts, as in connection with the written contract, to amount to a fraud upon the rights of creditors. Fraud is very often, indeed, most usually a mixed question of law and fact. Such was the case in the present instance, and the court below, did right in overruling the motion to exclude the written contract from the jury.

3. The third assignment of errors charges, that the court below erred in admitting as evidence the deposition of Bull & Files; and also in admitting the evidence of the witness, Branch, under the circumstances, and after objection by the plaintiff.

The deposition of Bull & Files, it will be recollected, was objected to on the ground, that it went to prove that they had, at the claimant's request, paid certain drafts and acceptances against John H. Walker, which drafts and acceptances were not introduced nor exhibited, nor their absence accounted for. So the evidence of Branch, a constable, was offered to prove payment of a certain sum of money by the claimant, on some judicial process against said John H. Walker; and his evidence was moved to to be excluded on the ground of immateriality, and that the process was not produced.

The principle on which this evidence was sought to be excluded, is, that you cannot prove the contents of any written contract, or instrument, by parol evidence, unless it is first proven to have been destroyed, or its absence is satisfactorily accounted for. This rule is doubtless salutary, and should be sustained whenever it applies—but there are many exceptions to it. In 1 Phillips on Evidence, 303, it is laid down that "The general rule, therefore, that the best evidence is to be produced, which the nature of the thing admits, is to be understood as applying to deeds and agreements, which *form part of the issue*, or which *are material to the issue*, &c."

In the case of Waring v. Warren, [1 Johns. Rep. 340,] it ap-

pears, on the trial, one Gilbert, who was a deputy sheriff, was sworn as a witness, and proved, that in 1798, by virtue of an execution, he took the goods, &c. of one Stephen Nocus, and sold them at auction, at which sale the plaintiff below became the purchaser of the goods, corresponding with the description of those claimed by the plaintiff, and which were specified in a paper produced by the witness. The witness, or sheriff, made a copy from the paper, which contained an account of the articles purchased by the plaintiff, and a receipt, which was delivered to the plaintiff. The witness was then asked what were the contents of that paper? The defendant's counsel objected to the evidence, on the ground, that the plaintiff ought to produce the paper itself, or show it to be lost. The objection was overruled by the court, and the witness permitted to give evidence of what the paper contained. The case went to the Supreme Court of New-York, where it was held, it was not necessary to produce the paper; that it was sufficient for the plaintiff to shew, he had purchased the goods at auction; that it was a paper with which the defendant had nothing to do, and which the plaintiff was not bound to produce.

In the case of Keene v. Meade, [3 Peters, 7 and 8,] a witness proved a payment of $250 for the plaintiff, and stated that the defendant made the entry on the plaintiff's rough cash book himself, writing his name at full length. The witness fully proved the payment of the money, but the defendant objected to such parol proof as written evidence of the payment existed and should be produced. Mr. Justice Thompson, in delivering the opinion of the court, remarked, among other things: "This objection we think not well founded. The evidence of the advance made by the defendant himself under the circumstances stated, cannot be considered better evidence, within the sense and meaning of the rule on that subject, than proof of the actual payment." Again, he remarked, "it cannot be laid down as a universal rule, that when written evidence of a fact exists, all parol evidence of the same fact must be excluded. Suppose the defendant had written a letter to the plaintiff, acknowledging the receipt of the money, it certainly could not be pretended, that the production of the letter would be indispensable, and exclude all parol evidence of the advance, and yet it would be written evidence."

In the case of the administrator of Wiggins v. administrator of

Pryor, [3 Porter 430,] this doctrine was fully recognized. In that case a witness in deposing to the payment of the amount of a note, spoke of a receipt having been given. It was objected, that parol evidence of the payment could not be given; that the receipt must be produced, or its absence accounted for. But this court held, that there was no error, and fully recognized the competency of the parol evidence of the payment. [See also, 1 Ala. Rep. N. S. 121.]

It may be further remarked in regard to the competency of the parol testimony, referred to, that it went to establish the mere fact of the payments of money, in the respective cases, and not to prove the contents of the papers *which were not in issue, nor material to the issue* between the parties. This proof of payment too, was in discharge of so much of the consideration agreed to be given for the property—and it was, besides, in evidence, that the debts thus discharged, by the claimant, were so discharged by the directions of Walker, the grantor.

With these views of the principles applicable to the plaintiff's third assignment of errors, it cannot be sustained.

4. The fourth assignment raises an objection to the competency of the evidence of one May, a deputy sheriff, who proved that he had levied an execution on the property of Walker, which he produced, and proved the entries thereon were correct. The execution seems to have been given in evidence to prove a lien on the property of said Walker, but seems to have been unaccompanied by any evidence of payment by the claimant, or any other proof to render it relevant; hence, its materiality cannot be perceived.

5. The fifth assignment refers to a part of the bill of exceptions, which shews, that the counsel for the plaintiff called on George Walker, on his cross-examination, to state, in substance, whether, notwithstanding the witness and John H. Walker purported to be securities only, in the note on which this judgment is founded, for J. B. Wilkins, the said John H. Walker had not, in fact, become the principal debtor, in consequence of the transfer of property, notes, &c., to the amount of about $20,000, to meet this and other debts, under an agreement entered into between said parties.

The court excluded this evidence on the objection of the claimant, and we are unable to perceive its relevancy, or materiality.

It was of no consequence as regarded the liability of John H. Walker, or his property, whether he was originally, or by subsequent agreement, between himself and his co-makers of the note on which the judgment was obtained, a principal or security. As between himself and the plaintiff, he was equally bound, and his property was equally liable to satisfy the execution, whether he was, or had been principal or security.

6. The sixth assignment is predicated on the refusal of the court, to exclude parol evidence, given by J. B. Wilkins, to prove the payment of a certain debt by claimant for said John H. Walker, on the ground that it was a judgment debt, in which Wilkins was principal, and said Walker and others securities. The principles laid down in reference to the third assignment, are equally applicable here—especially in connection with the proof, that all the debts paid by claimant for said John H. Walker, were so discharged by his directions.

7. The seventh assignment refers to a part of the bill of exceptions, which presents no point sufficiently intelligible to be distinctly comprehended.

8. The eighth assignment of error brings in question the opinion of the court, in relation to the testimony of John H. Walker, the grantor of the property, which is the subject of controversy. The question propounded to said Walker was, whether in the contract between himself and said claimant, they intended to defraud the creditors of said Walker? To the admission of such testimony, the plaintiff objected—but the objection was overruled by the court, and the witness was permitted to say to the jury, "no fraud was intended in said contract; that such a thing was never thought of by either."

The general rule certainly is, that a witness can only depose to such *facts* as are *within his own knowledge*, and cannot be supposed to speak upon mere conjecture, or belief, however strong. It is true, there are exceptions, but the evidence in the present case does not fall within any of them. A witness may be permitted to testify to his belief of the identity of a person; or that the hand-writing in question is, or is not, that of a particular individual, provided he has any knowledge of the person or hand-writing. So, on questions of science, skill or trade, or others of a like kind, persons of skill may not only testify as to facts, but are permitted to give their opinions in evidence.

[Greenl. on Ev. 488, '9, § 440.] But, in the evidence admitted by the court, no fact was stated, which, as it regarded the claimant, could possibly be within the knowledge of the witness. The evidence of the witness did not go to *a fact within his knowledge, but to the intention of another man*, which, however strongly he might be justified in *believing* to be as stated, he could not *know;* and the witness testified, not only to the intention, with which the claimant acted, but also, that such a thing as fraud in the transaction, had not been *thought of* by either *the claimant* or himself. We are, therefore, of opinion, that the court erred in overruling the plaintiff's objection to this testimony.

9. The next assignment alleges that the court erred in refusing to instruct the jury, as requested by the plaintiff, in the first instructions moved, and in the contrary instructions given, as stated in the bill of exceptions. On reference to the bill of exceptions, it appears the court was requested to charge the jury, that if, under the terms of the written contract, there was no change of possession, and if no special circumstances were proved, to explain why the possession did not accompany and follow the sale, and the said vendor was then insolvent—then, the failure to transfer the possession was conclusive evidence of fraud, as against the plaintiff in the execution, and the property liable to condemnation.

The court refused so to instruct the jury, but charged them, "that the above was a circumstance only, from which the jury might infer fraud, unless there were circumstances in evidence, which, in their opinion, were sufficient to outweigh this presumption, in which latter event, they should not so regard them."

The case of Hobbs v. Bibb, [2 Stewart 54,] decided by this court, some fourteen years ago, may be considered the leading case, as regards the law of this State, applicable to the question before us. Before that case, the question was unsettled, whether we should be governed by the arbitrary rule laid down by the Supreme Court of the United States, in the case of Hamilton v. Russell, that in the case of an absolute sale, possession remaining with the vendor, should amount to fraud *per se;* or that such possession remaining with the vendor, should only be considered *prima facie* evidence of fraud. In the case cited, however, after a full and careful examination of the English and American authorities, this court came to the conclusion, and adopted the rule,

that possession of personal property remaining with the vendor, after such absolute sale, should be presumptive evidence of fraud, but which presumption might be rebutted, or explained away by circumstances. In the case of Ayres v. Moore, [ib. 336,] which came up for adjudication at the ensuing term, the court below charged the jury, "that if they believed the consideration of the bill of sale was *bona fide*, and that it was recorded within six months after its execution, it was good and valid in law, though the negro remained in the possession of the vendor, J. B. M., previous to that time." This court held the charge to be erroneous, as being founded on two facts, "not sufficient of themselves to constitute title and remove the presumption of fraud, arising from the possession remaining with the vendor." This was saying, in effect, that although the consideration might be perfectly fair, and in good faith, and although the bill of sale might be recorded (which is not required by law)—still, if the possession remain with the vendor, the presumption of fraud attaches—something more must be done to remove that presumption. What is sufficient to effectuate that object? We answer, let it be shewn, as in the case of Hobbs v. Bibb, that the property had been purchased for a fair and full consideration, truly paid; that the negroes remained with the vendor on hire, which was actually paid, and that the transaction was known publicly. Or, let it be shewn that it was impracticable, or extremely inconvenient, at the time of sale, to change the possession—some reasonable excuse, or satisfactory explanation at least, should be shewn, to rebut the legal presumption, that the right of property is with the possession of a personal chattel.

In the case of Blocker, adm'r v. Burrus, [2 Ala. Rep. N. S. 354,] the court below refused to charge, that possession remaining with the vendor, after an absolute sale, amounted to fraud *per se*, but charged the jury, "that if they believed from the evidence, that the transaction was upon fair and sufficient consideration, was *bona fide*, and not intended to hinder or delay creditors," they must find for the vendee. This was saying, in effect, all that was required by the rule, laid down in the case of Hobbs v. Bibb, though not in the same language; it was requiring the sale to have been fair, in good faith, upon adequate consideration, and all this accompanied by evidence, or circumstances, to rebut the presumption of any intention to hinder or delay creditors.

Such evidence, as that alluded to in the last branch of the charge must have been such facts, or circumstances, as would satisfy a candid mind, that there was a reasonable excuse, for not having changed the possession of the property at the time of sale. No further, or more explicit charge was called for by the opposing counsel; the case was brought up, and this court affirmed the judgment of the court below.

The question recurs—was the charge of the court below, in the case at bar, conformable to the principles thus established? The counsel for the plaintiff, adverting to the terms of the written contract, which was for an absolute sale, called on the court to instruct the jury, that, if there was no change of the possession of the property, and if no special circumstances were proved to explain why the possession did not accompany and follow the sale, and if they believed that the vendor was then insolvent, then the failure to transfer the possession was conclusive evidence of fraud as against the plaintiff in the execution. These instructions the court refused to give, and, as we think, in that refusal, erred. We have seen that the mere fact, of property remaininig in the possession of the vendor after an absolute sale, is *prima facie* evidence of fraud—this, of itself, unexplained, would be sufficient to authorise a verdict against the vendee. But, when with the facts of an absolute sale, and of the possession remaining unchanged, we connect the additional assumptions, that there were no circumstances to explain why the possession did not accompany and follow the sale, and that the vendor was insolvent, we must consider *the evidence of fraud conclusive.* It is a well settled principle, that *the facts being ascertained, fraud is a question of law.* Let us, then, test the question, by supposing the above facts ascertained by evidence, that this was an absolute sale; that the possession remained with the vendor; that he was insolvent, and that there were no special circumstances in evidence, to explain why the possession did not accompany and follow the sale: could we hesitate to say, that in legal contemplation, the evidence of fraud was conclusive? We think not, and therefore conclude, that the court below erred in refusing the instructions requested by the plaintiff.

We deem it unnecessary to go into the remaining questions raised on the bill of exceptions, considering them sufficiently met

by the views already presented on the assignment of error, last noticed.

Let the judgment of the court below be reversed and the cause remanded.

COLLIER, C. J.—I had supposed Blocker v. Burruss, [2 Ala. Rep. 354] was irreconcileable with Ayres v. Moore, and consequently, dissented from the conclusion which my brother attained. According to my understanding of it, it determined that the vendee of personal property might repel the presumption of fraud arising from the retention or possession by the vendor, by showing that the sale was *bona fide*, without any proof of special reasons why the possession did not follow it, and vest in the vendee. But I learn from my brother ORMOND, that such was not the opinion of himself and our late learned associate. However much I might have been disposed to regard Blocker v. Burruss, as authoritative, even as understood by me, I feel it my duty to adopt the exposition of it which has been given in the opinion of the court; and to add, that I am pleased, that the very general terms in which the law was there laid down, has been restricted in the present case, so that neither the bench or bar may be misled in future.

EVANS v. BOLLING.

1. The credit of a witness may be impeached after the publication of his testimony, by *articles of impeachment*, upon the filing of which an order will be granted, that the party be at liberty to examine witnesses as to the credit of the witness whose testimony is impeached. Upon this examination, the only enquiry is, whether the witness is to be believed as a man of veracity, or not. No fact material to the issue can be enquired into; but if the witness, on his examination, had stated a fact falsely, *not in issue*, it may be contradicted. The 44th rule of chancery practice, dispensing with the necessity of filing "articles of impeachment," does not vary the case—the examination must still be confined to the credit of the witness sought to be impeached.

2. The refusal to continue a cause, cannot be reviewed on error, in chancery, any more than at law.
3. A party has no right to amend his bill in a material point, after the cause is ripe for a hearing.
4. An affidavit of the loss of a bond, so as to let in secondary evidence of its contents, may be made in the body of the bill, or by a separate affidavit.
5. It is no ground for rescinding a contract for the sale of land, when it appeared that the vendee was put in possession of the land he intended to purchase, and the vendor intended to sell, although a part of the land was incorrectly described in the bond executed by the vendor for title; he being able and willing to correct the mistake, and to make title according to his contract.
6. A contract cannot be rescinded because the vendor had not title to a part of the land sold, when the contract was made, but which he obtained before any demand for title, or offer to rescind the contract by the vendee.

ERROR to the Chancery Court at Eutaw.

This was a bill filed by the plaintiff in error, to rescind a contract for the sale of land, upon the ground of fraud and misrepresentation. The complainant alledges that on the 1st of March 1837, he purchased from the defendant, Bolling, eight hundred acres of land, which he describes by its designation at the land office, and a number of slaves: That a bond was executed by Bolling for title when the purchase money was paid; that the consideration recited in the title bond was fifteen thousand six hundred dollars, of which sum four thousand four hundred dollars was the price of the negroes: this sum was payable in four annual instalments, for which notes were executed, with one Arrington as surety. The three notes first falling due were transferred by Bolling to one Earbee, by whom they were transferred to other persons.

The complainant alledges the fraud to consist in the false representation, by Bolling, that one of the tracts contained a valuable mill seat; that the bond for title omitted eighty acres of land sold to complainant, and to which Bolling had no title; that of the lands so sold and described in the title bond, there were three hundred and sixty acres to which Bolling had no title, and of which complainant never obtained possession; that these lands were then and still remain in the possession of four other persons, who are named; and that those lands constituted, with the supposed mill seat, a great and principal inducement to the purchase; that complainant did not discover the fraud for some time, as he

did not wish to cultivate the land, and did not discover it until searching for the mill seat.

The complainant further alledges, that the purchase of the land and slaves was not a joint purchase, but that the price of the slaves was included with the purchase of the land, for convenience only, and that after the purchase was agreed on, some corn, fodder, hogs, bacon, &c. were thrown in by Bolling; that after Earbee became the owner of the notes, he received from complainant the slaves, and credited two of the notes by the amount.

That after the discovery of the fraud, and by advice of counsel, he handed the bond for titles to the subscribing witness, and desired him to take it to the county clerk's office, prove it, and have it recorded, which he did, and the bond, after being proved, was copied on the record book. That some time after he applied for the bond, but after diligent search it could not be found, nor has he been able since to find it, and avers that it is lost, and files with the bill a true copy taken from the records of the office, as the best evidence in his power to produce. The different persons who have become interested in the notes executed by complainants, are made parties. The bill prays a recision of the contract.

Bolling answered the bill, and denies fully and unequivocally, all the fraud charged in the bill. He asserts that he was and still is the owner of all the land sold by him to complainant, and able to make title thereto, except eighty acres, which he knew he could procure when he made the sale, before he could be called on for the title, and has since procured. That the bond he executed for title, will, if produced and *not altered*, establish the fact, and he recites particularly the different tracts sold by him. That the land, slaves and other property were sold together, and constituted one entire contract—and that he was not privy to, or consenting to the sale of the slaves by complainant to Earbee. That before the purchase complainant went on the land, which respondent correctly described to him by its metes and bounds. That in relation to the mill seat he merely informed the complainant that he had been told by a previous owner of one of the detached pieces, that it contained a mill seat, and proposed to him to examine it, which he declined to do. That he made no representation which was not strictly true, and that the complainant well knew what land he was purchasing. That

complainant was in possession of, and resided on the land so sold during the years 1837 and 1838. He insists that the copy produced is not a true copy of the original bond, but is spurious.

Earbee answered the bill, and admits that he received the slaves from complainant, and credited the amount on the notes as stated in the bill. The answers of the other defendants are not important.

S. F. Miller, the witness to the title bond, deposed that he witnessed a bond for title to lands executed by Bolling in March, 1837. That in January, 1838, at the request of Evans, the obligee, he took the bond to the county clerk's office of Sumter, to be recorded, made oath to its due execution before a deputy clerk, James Keene, and delivered it to him to be recorded, having a short time previously read it over, and thinks it certain that if any alteration had been made in it, he should have discovered it; can not say whether the copy exhibited with the bill is a true copy, as he never compared it with the original.

James Keene, a deputy clerk, states that he received from S. F. Miller, on the 29th January, 1838, a bond from Bolling to Evans for titles to land, which was proved by Miller and recorded by him next day, and that the exhibit in the bill is a copy from the record, and thinks that after being recorded it was revised by him and another clerk. That the original remained in the office until complainant called for it, when it was handed to him, and thinks he put it in his bosom; whether he carried it away with him or not, cannot say—has never seen it since.

Stephens says he was a clerk in the office, but knows nothing of the title bond, or whether he assisted in revising it; but that if he did a true copy was made.

R. H. Smith, Esq. testified that in July, 1838, Bolling called at his office and desired to see the title bond, saying that he believed that in drawing the bond he had inserted the wrong numbers of land, and that if Evans was any part of a gentleman he would let him correct it, and insert the proper numbers. The copy was not then in the hands of Mr. Smith.

Much other testimony was taken, which, from the view of the case taken by the court, is unimportant.

Samuel H. Bolling, for defendant, testified that the land sold to complainant was correctly stated in the answer of the vendor. That he was the near neighbor of the vendee; saw him in posses-

sion of the land so purchased, on which he made two crops.—Had frequent conversations with him about the land, in one of which a dispute arising between them about the lines of the tract, complainant on a piece of paper, described the lines of his tract, which agreed with the land the vendor alledged he sold to him. Other testimony was also adduced, which is sufficiently set forth in the opinion of the court.

After the testimony of Bolling was published, the complainant made affidavit that he was surprised by the testimony of S. H. Bolling; that it was untrue, and that he could prove facts showing its untruth, by proving that the witness had sworn differently about the same matter on other occasions, and also by the proof of other facts, show that the testimony of the witness was not true, and moved the court to continue the cause, to enable him to make this proof. This motion the court overruled, and also a motion made at the same time for leave to amend the bill, by alledging that J. H. Bolling, the vendor was insolvent.

The chancellor then proceeded to the hearing of the cause, and dismissed the bill, from which decree this writ of error is prosecuted.

Thornton and Smith, for plaintiff in error—cited 1 Littell, 359; Cox's Dig. 135, 6; 1 B. & H. Dig. 156, sec. 13; 2 Bibb, 5, 200, 556; 3 Cranch, 270; 4 Dess. 149; 1 Porter, 259; 3 Porter, 125; 3 Bibb, 464, 539, 143; 6 Cranch, 9, 24; 1 Peters, 245; 1 Madd. C. P. 26, 7; 1 Monroe, 239; 7 ib. 445–514; Litt. S. C. 358; 4 Munf. 254; 2 Sum. C. C. R. 316; Gress. Eq. Ev. 140–3.

Hair, *contra.*

ORMOND, J.—Some preliminary questions have been raised, which it will be proper to consider before proceeding to the investigation of the merits of the case.

It is the settled law of this State, that an application to continue a cause is addressed to the discretion of the primary court, and cannot be reviewed here. To evade the force of this rule, it is contended that the application made to the chancellor in this case, and refused by him, though in form an application for a continu-

ance, was, in effect, the exhibition of articles of impeachment against the witness, S. H. Bolling.

The proper mode of impeaching the credit of a witness, is by the exhibition of *articles of impeachment*. They may be exhibited either before or after publication of the testimony, and on being filed, an order will be granted that the party be at liberty to examine witnesses on general interrogatories, as to the credit of the person whose testimony is sought to be impeached. [Lube's E. P. 99.] Upon this examination, no fact material to the matter in issue can be enquired into; but if the witness has voluntarily stated a fact, falsely, not in issue between the parties, it may be contradicted. [Wood v. Hammerton, 9 Vesey, 145; Carlos v. Brook, 10 id. 49; White v. Fussell, 1 Ves. & B. 151; 2 id. 267, note; Troup v. Sherwood, 3 J. C. C. 558.]

The 44th rule of chancery practice, dispensing with the filing of articles of impeachment, and permitting the testimony of witnesses to be impeached by deposition in the usual mode, has no influence on this question. In either mode the examination must be confined to the credit of the witness sought to be impeached.

The application, in this case was to continue the cause, that the complainant might prove, not that the witness was unworthy of credit as a man of veracity, or that he voluntarily swore falsely to any matter not in issue, but to prove, by the adduction of other testimony, and that too which the complainant must have known previously, that the facts sworn to by the witness, which were strictly within the issue, were untrue. This is never tolerated. Chancellor Kent says, "no art or stratagem can conduct the enquiry to the forbidden ground of the matter in issue." The reason is, that if such examinations were permitted, they would be resorted to in every case, and would be endless. There is not the slightest ground for considering this application as the exhibition of articles of impeachment. It is what it purports to be, a proposition to continue the cause to enable the party to adduce other testimony relating to the matter in issue, and the decision of the chancellor upon the application must be considered final.

Incorporated in the same application was a request, to be permitted to amend the bill by charging that J. H. Bolling, the vendor, was insolvent. In Bryant v. Peters, [3 Ala. 170,] we considered the question of the right of a party to amend his bill, and it was then held, that he had the right to amend it any time before

depositions were taken, no replication being filed to the answer. Here, the application was made after depositions taken on both sides, and the cause ripe for a hearing, and was therefore properly refused. In addition, it may be stated, that as the contract was impugned for fraud, it was unimportant whether Bolling was solvent or insolvent.

We do not think it important whether the affidavit of the loss of the bond for title, so as to let in secondary evidence of its contents, was incorporated in the bill, or made upon a distinct and separate paper. The substance of the affidavit of loss is, that after diligent search it cannot be found in the clerk's office, where it was deposited to be recorded, or among the private papers of complainant, and he has never been able to find the same. This is certainly open to the objection that it is very cautiously and guardedly drawn. It does not state the belief of the party that the paper is lost or destroyed, but that it cannot be found in two places which are named. From the view, however, which we take of the case, it is not necessary to pass on its sufficiency, and we will therefore proceed to the consideration of the merits of the case.

The purpose of the bill is to rescind a contract entered into between the complainant and the defendant, John H. Bolling, by which the latter sold to the former a tract of land of eight hundred acres, to a considerable portion of which the vendor, it is alledged, had no title or claim, but that the same was then owned by, and in the possession of other persons; also, that eighty acres of the land so purchased, was designedly left out of the bond for title; also that the vendor fraudulently represented the land to be of better quality than it was, and that it contained a mill seat, when in fact there was none upon it. That the land so purchased, except eighty acres, was described in a bond for title executed by the vendor; that the bond is lost, and a copy, taken from a record made of it in the county court clerk's office of Sumter, is appended to the bill as an exhibit.

The answer of Bolling is a full and explicit denial of all the material allegations of the bill. He states that the complainant well knew the land he intended to purchase, and did in fact purchase, and was put in possession of. That the copy of the bond for title exhibited with the bill, is not a true copy of the original, and he gives a description of the land sold, by its designation at the

land office, the title to which was then and is now in him, except eighty acres, to which he admits he had no title when the land was sold, but knew that he could obtain it before he could be called on for title, and has in fact obtained it.

The denial of the answer of all the supposed equity of the bill, brings the matter to a question of evidence—has the complainant proved his case, as required in a court of equity, so as to outweigh the denial of the answer?

The only proof offered by the complainant of the identity of the lands purchased by him, is the description of it contained in the bond for title. The original being alledged to be lost, secondary evidence was offered of its contents. This consists in the proof of the subscribing witness; that the original was executed in March, 1837, and that in January, 1838, at the request of complainant, he handed it to a deputy of the county clerk of Sumter, to be recorded, and proved its execution. That at that time it was in the same condition as when executed; no alteration having been made in it.

James Keene, the deputy clerk who received the bond, deposes that he recorded it, and that the record thus made is a correct copy of the original. He thinks it was revised by him and another deputy, Mr. Stephens.

Stephens deposed that he had no recollection of the original, and could not say whether he had ever compared it with the record made by Keene, and therefore could not say whether the record made by Keene was or was not a correct copy of the original. Mr. Price Williams, the principal clerk, has never seen the original, and knows nothing of the correctness of the copy.

In the case of an office copy of an instrument required by law to be recorded, which the proper officer certifies to be a true copy of the original, the presumption of law, in the absence of proof to the contrary, is, that it is a true copy. The law casts on him the duty of being fully satisfied that the record which he has made is a faithful transcript of the original, and therefore his certificate is *prima facie* evidence of that fact. This bond was not by law required to be recorded, and its registration was a mere unofficial act, deriving no aid from the fact that it was made in the office of the county clerk.

The admission of secondary evidence, of the contents of an instrument alledged to be lost, is submitted to from the necessity

of the case; but in the admission of such testimony, care should be taken that the party who is not in fault be not injured by the admission of proof rendered necessary by the negligence or misfortune of his adversary. In a case like the present, where the party against whom the secondary evidence is offered, is not in fault, and especially when he swears that the paper offered as a copy is not a correct copy of the original, the evidence ought to be such as not to leave a reasonable doubt of its correctness; it ought to be such that the mind of the court or jury may repose on it with safety.

It is very clear that the only correct mode of ascertaining the correctness of a copy, is by the aid of another person, to compare it with the original; and indeed the books always speak of an *examined* copy as evidence, where the original cannot be produced. [Philips Ev. 457.] This was especially necessary in this case, where the important and debated portion of the deed, consisted of a list of separate tracts of land, which in copying, would furnish the transcriber no aid from the context. In the copy furnished, we find the south *east* quarter of section eleven, as one of the tracts sold, whilst the vendor in his answer, insists that it was the south *west* quarter of the same section. How easy it would be for a mistake of this kind to occur, every one will perceive. It is true, the clerk who transcribed it on the record book, says it is a correct copy of the original, but when asked whether the copy was compared with the original, he does not say positively that it was, but he thinks he compared it with Mr. Stephens. When Stephens is enquired of, he has no recollection of ever having seen the original, he knows nothing of any such comparion. As therefore the only test of the truth of the copy rests upon the fact that it was compared with the original, and as there is no proof but the belief, or conjecture, of the witness, that such examination was made, it would seem to follow that the correctness of the copy was not made out beyond a reasonable doubt.

In Taylor v. Riggs, [1 Peters, 600,] a witness, in proving the contents of a written instrument, had sworn to what was his impression and belief of its contents. In reference to which, C. J. Marshall says, "when a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollections concerning its stipulations, ought to supply the place of the written instrument itself. The substance of the agreement ought to

be proved satisfactorily, and if that cannot be done, the party is in the condition of every other suitor in court, who makes a claim which he cannot support." In this case, it is true, the supposed copy is in writing, but its validity, as a copy, depends upon its having been compared with the original, about which the witness is not able to state any thing with certainty. To the same effect are the remarks of Mr. Justice Story, in the United States v. Britton, [2 Mason, 468.]

We do not consider the testimony of Mr. Smith as affording any aid in establishing the correctness of the copy. It is evident that the vendor had been informed that the complainant had a copy of the bond, which did not correspond with his own statement of the lands he had sold, for which reason he desired to see it. The utmost effect that can be ascribed to his language during the conversation with Mr. Smith, is an admission that there might be a mistake, which, if it existed, he was willing to correct. It is proper also to state, that the objection of the chancellor, that the exhibit is the copy of a copy, is technically correct; this objection however, could be removed by the production of the record book from which the copy was made.

If the copy was shewn to be a true transcript of the original bond, it would have the same weight, as evidence, as the original, and would doubtless outweigh the denial of the answer. But as its correctness as a copy, rests on the mere belief, or opinion, of the witness Keene, it is not sufficiently established against the positive denial of the answer; the rule being that the denial of the answer can be countervailed only by the oaths of two witnesses, or by that of one with corroborating circumstances.

We are unable, however, to perceive that the case would be varied, if it were conclusively shewn that the copy was a literal transcript of the original bond. The true question is, what lands did Bolling sell, and the complainant purchase? And was Bolling able to make title?

The bill is exceedingly obscure on this important point, and it is only by inference that it can be ascertained from it, that the complainant supposed he was purchasing, and did purchase, from Bolling, the lands described in the exhibit to the bill, and eighty acres in addition, which he does not attempt to describe. The answer positively denies the sale of the two hundred and eighty acres described in the exhibit, to which the vendor had no title;

and describes each particular parcel of the eight hundred acres, which he alleges the complainant purchased and was put into possession of. The answer is supported in every particular by the deposition of Sam. H. Bolling. The witness was the near neighbor of complainant, knew the land and saw him in possession; had repeated conversations with him about it, in one of which he described the lands he had purchased, which corresponded with the land as decribed by the defendant in his answer, and that he made two crops on the land. In one of these conversations he told witness, that he intended to clear on the east half of the south west quarter of section 23, as it was better land than he expected to find it; yet this piece of land is not on the exhibit filed with the bill, nor a part of the land which the complainant alleges he purchased, but is a part of the land described in the answer.

The testimony of this witness has been assailed as improbable, but we can see nothing unreasonable or improbable in it; on the contrary, it is a material and probable account of an occurrence which frequently takes place between neighbors owning or living on adjoining tracts of land. But the testimony of this witness is strongly corroborated by the internal evidence arising from the facts as stated in the bill, and shown by the testimony. That one man should attempt to practice a fraud on another by selling to him, on a credit of four years, a large tract of valuable land, one third part of which belonged to, and was in the possession of five other persons, is only less wonderful than that any one could be found on whom such a fraud could be practiced, and be in possession for a considerable space of time, without discovering the fraud. The land which the vendor alleges he sold, lies principally together, six hundred acres of it being in a body and forming an oblong square, with two detached eighty acre tracts, and is proved to be much more valuable than the land alleged to be sold; the land the complainant says he purchased, takes one quarter section from the main body and removes it half a mile, detached from all the rest of the land.

Again, we find that when the complainant became dissatisfied with his purchase, and after Earbee had become the owner of three of the notes, his objection was not that the vendor had no title to the lands, but that the *quality* of the land had been misrepresented, and that one of the negroes was unsound. It does not

appear when this conversation, at which Bolling was present, took place; but it must have been some time after the purchase, as we learn from the testimony that in August or September, of the year he purchased, he was highly pleased with his bargain, and further, it shows that he had then examined the land.

If, then, it was absolutely certain that the copy of the bond for title made by Keene was a correct transcript of the original, it would only establish a mistake, which as the vendor was willing and able to rectify, would be no ground for rescinding the contract, as it is perfectly clear from the answer and the proof, that the complainant obtained the lands he purchased, and that the vendor is able and willing to make title.

The alleged misrepresentations as to the quality of the soil, and the existance of a mill seat on one of the detached pieces, is denied in the answer, and there is no proof that such representations were made. To prevent misapprehension, however, it is proper we should say that it would not vary the case if they were proved as alleged in the bill. The purchaser must judge for himself as to all matters which lie in opinion merely; assertions by the vendor of the value or quantity of an article open to the inspection of the buyer, should pass for nothing; and if the purchaser, supinely resting on the interested opinion of the owner of the article he is endeavoring to sell, should find himself deceived. he must pay the price of his own folly; he cannot be relieved in chancery. [Camp v. Camp, 2 Ala. 635, '6.]

We do not consider it important that the vendor had not the title to eighty acres of the land sold, at the time of the sale, as he was able to make the title at the time the answer was filed, having procured it as stated in his answer, before the first note fell due The question might have been very different, if a demand for title, and offer to rescind had been made before the vendor was in a condition to make title.

The result of our examination is a conviction that the decree of the chancellor, dismissing the bill, is correct, and it is therefore affirmed.

Ex parte, SANFORD.

1. A writ of error will not lie to revise an order dissolving an injunction—the remedy in such case being by appeal under the act of 1836; and if a judgment of affirmance is rendered on certificate, against the plaintiff in error and his sureties, it will be regarded as a nullity, and may be set aside at the succeeding term, on motion of one of the sureties.

This was a motion by a surety in a writ of error bond, to vacate a judgment rendered at the last term on a certificate from the clerk of the circuit court of Mobile. The motion is founded on the affidavit of Sanford, the certificate on file, and the transcript from the record from the circuit court. From the affidavit it appears that Abijah Fisk, recovered a judgment in the circuit court, for tweniy-four hundred and twelve 32-100 dollars, against Thaddeus Sanford, who filed a bill in chancery to enjoin the same, and together with John B. Hogan as his surety, executed an injunction bond; at the spring term of the court of chancery, holden in 1842, the injunction was dissolved, and the bond with the order of dissolution was certified to the circuit court. That Thaddeus Sanford applied to James Sanford, the affiant, to join in a bond to review the order of dissolution, and that T. Sanford, Hogan and this affiant, thereupon entered into a bond for that purpose, before the clerk of the circuit court; but being advised that the matter could only be revised on appeal, the transcript was not removed to the Supreme Court, and the proceeding intended to be abandoned. The affiant further states, that the bond to which he has referred, is the only bond he executed with T. Sanford and Hogan, and on that he understands the judgment has been rendered.

The certificate describes the case thus; "Abijah Fisk recovered a judgment against Thaddeus Sanford and John B. Hogan for the sum of twenty-four hundred and twelve 32-100 dollars, and six per cent damages, awarded by the court of chancery, for delay, &c. besides costs of suit:" it also states the term when the judgment was rendered, the date of the bond, &c. The transcript from the circuit court is nothing more than the certificate

of the register in chancery, embodying the order of dissolution and bond for an injunction; both of which agree with the affidavit and certificate on which the judgment of this court was rendered.

DARGAN, for the motion.
G. GOLDTHWAITE, *contra.*

COLLIER, C. J.—In Russell, et al. v. Peirce, [7 Porter's Rep. 276,] we decided, that an order dissolving an injunction could not be revised on writ of error, but the only mode of bringing it before this court, was by an appeal under the act of 1836, and under the influence of that opinion the writ of error sued out in that case was dismissed. If the facts now shown by the papers before us, had been made known when the judgment on certificate was asked, we should have refused to render it, on the ground of a want of jurisdiction: *first*, because the clerk of the circuit court, was not authorised to award a writ of error to review an order in chancery. *Secondly*, because the order complained of was not revisable on error. This being the case, is it competent now, at the term after the judgment of affirmance has been rendered, to vacate it? It has been said, that during the term the records are in the breast of the court, and may be amended; but after the term, no amendment can be made, unless it be the correction of a clerical misprision. [Freeland v. Field, 6 Call's Rep. 12; Hall v. Williams, 1 Fairf. Rep. 278; State v. Calhoon, 1 Dev. & Bat. Rep. 374; Halley v. Baird, 1 H. & M. Rep. 25; see also Hopkins v. Flynn, 7 Cow. Rep. 526.] But it has been repeatedly held, that where a judgment has been rendered in which the court had no jurisdiction, it is competent for the court, at a succeeding term, to state the facts on the record, and declare the invalidity of the judgment. Thus in Hammer v. McConnell, [2 Ohio Rep. 32,] process issued against two and was served on one only, the declaration was against the party served, who alone pleaded, but the verdict and judgment was against both; the judgment was considered to be amendable at a subsequent term, by striking out the name of the defendant, who was not before the court. In Hill v. West, [1 Binn. Rep. 486,] one of the two defendants died before judgment, judgment was entered against both, and a writ of error was sued to a higher court,

where it was non-prossed; afterwards, upon error *coram vobis*, the death of one of the defendants was assigned for error, and an amendment was permitted, by entering a suggestion of the defendant's death with the same effect as if done before judgment. [See also Rudesil v. Lesene, 2 Rep. Con. Ct. 58.] So in *ex parte* Crenshaw, [15 Peters' Rep. 119,] the Supreme Court of the U. States set aside a judgment which it had rendered at a preceding term, on the ground, that the defendant in error had not been served with a citation, and did not appear.

In the present case, we cannot regard the form of the certificate as interposing an obstacle to the allowance of the motion. Its form is unusual and would lead to the conclusion that the judgment at law had been injoined, and of course all errors in the record of that case, either impliedly or expressly released. Besides, it indicates that the writ of error was intended to bring up the order of dissolution, or final decree, (had one been rendered) from what is recited in it of the "six per cent. damages for delay, &c." From all the papers which have been laid before us, we think it sufficiently apparent, that this court had no jurisdiction of the case to which the certificate refers, in the manner in which it was sought to be reviewed. The judgment of affirmance is consequently set aside and for nothing held.

WEAVER, use, &c. v. TRAYLOR.

1. Evidence is not admissible to prove declarations of his interest, in the matter of controversy, previously made by a witness, unless he has been examined, as to such declarations, and had the opportunity of admitting, denying, or explaining such declarations.

Error to the Circuit Court of Perry county.

This was an action of assumpsit, brought by the plaintiff against the defendant in the circuit court of Perry. On the trial, a bill

of exceptions was taken, which sets forth, that the plaintiff introduced the deposition of Allen E. Laughridge; which was read to the jury. The defendant sought to impeach the credibility of this witness, by proposing to prove certain declarations previously made to the defendant, pending the action. The declarations proposed to be given in evidence, were to the effect, that the witness Laughridge, claimed an interest in the demand, to recover which the action was instituted; that he said to the defendant during the fall term, 1842, if the plaintiff recovered a judgment, he said Laughridge would contend for his part of it; the deposition of said witness was taken in December afterwards. At the taking of the deposition of the witness, the defendant was represented by counsel, who cross-examined said witness, and though said counsel excepted to certain portions of the testimony; the exceptions had no reference to any supposed interest of the witness in the matter in controversy, and no questions were propounded to the witness touching his interest; nor did it appear that any questions were propounded to said witness, on his said examination, relating to any declarations made by him, said witness, respecting this action, or the claim on which it was founded, nor any claim or interest, asserted by said witness, at any time to any portion of the demand sued for. To the defendant's proposition to give in evidence the declarations of said witness, as referred to above, the plaintiff objected, but the objection was overruled, and those declarations of the witness permitted to go to jury—the plaintiff excepted to the opinion of the court; and now assigns for error,

1. Permitting the credibility of the witness Laughridge, to be impeached, by permitting testimony as to his declarations, without first interrogating *him* as to those declarations.

2. The matters disclosed by the bill of exceptions.

Wm. Hunter, for the plaintiff in error.

G. W. Gayle, *contra.*

CLAY, J.—But one question arises under the assignment of errors. That question is, whether it was proper to permit evidence to go to the jury, to impeach the credibility of the witness, Laughridge, on account of declarations of his interest in the matter in controversy, made before his deposition was taken? The

general rule is, "that, whenever the credit of a witness is to be impeached, by proof of any thing he has said, or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said or declared, or done that, which is intended to be proved." If the witness admits the declarations or acts, he has it in his power to explain, or give the reasons which go in exculpation of his conduct, and the whole matter is brought fairly before the court. If he deny the declarations or acts imputed to him, then witnesses may be called to contradict him. This rule is extended so far, that "although the fact to be adduced, in order to impeach the winess's testimony, be not discovered until after the conclusion of the cross-examination, the rule still holds; and evidence cannot be given, for the purpose of thus impeaching his testimony, without previous examination of the witness, even although the witness should have departed the court, and cannot be brought back, after the discovery has been made." [See 3 Starkie's Ev. 1753, '4 '6.] This rule is equally necessary to protect the witness from unjust aspersion, and to protect the interest of the party who relies on his testimony.

The rule laid down has received the sanction of this court on more than one occasion. In the case of Lewis v. Post & Main, [1 Ala. Rep. N. S. 65,] it was ruled, that when a witness, on cross-examination, is asked whether he has not made other statements than those sworn to, he may inquire as to the particular time or statement, to which the cross-examination relates, and if the information is not given, he ought not to be compelled to answer. [See the State v. Marler, 2 Ala. Rep. N. S. 43, and 2 Brod. and Bing. 310.]

In this case, the bill of exceptions shews, that the defendant was represented by counsel when the deposition was taken, who cross-examined the witness, but propounded no question in relation to any previous declaration of the witness, about his interest in the matter of controversy. If he had done so, the witness might have explained satisfactorily, or he might have been able to show, that although once interested he had ceased to be so; then the defendant might have introduced testimony to contradict the witness, if in his power.

This view of the authorities applicable to the subject, brings us to the conclusion, that the court below erred in admitting

proof of the declarations of interest, previously made by the witness.

Let the judgment be reversed and the cause remanded.

CHANDLER v. FAULKNER AND FAULKNER.

1. When a garnishee discharges a judgment rendered against him, if the creditor should afterwards attempt to enforce the collection of the original debt by execution, the court out of which it issued, would on motion, direct satisfaction of the judgment, so far as it was discharged by the payment of the judgment rendered against the garnishee; and therefore, a bill in chancery would not lie for that purpose, unless other facts were alleged, which would give the court of chancery jurisdiction.

APPEAL from the Chancery Court of Chambers.

This was a bill filed by the plaintiff in error, to enjoin the defendants in error, from collecting a sum of money by execution, which the bill alleges the plaintiff had been compelled to pay by a judgment against him as a garnishee.

The chancellor dismissed the bill, on the ground that relief could be had by *supersedeas* and motion in the court out of which the execution issued.

PECK and CLARKE, for the plaintiff in error.

ORMOND, J.—The case of Lockhart v. McElroy, [4 Ala. Rep. 572,] is in point, to show that this bill cannot be sustained. There is no allegation of facts to authorize the interposition of a court of chancery, but it is in effect merely an application to have satisfaction entered on the judgment of the defendant in error, so far as it is discharged by the payment of the judgment rendered against the plaintiff in error, as garnishee. This, the court out of which the execution issued, can direct to be done, on motion, and it cannot therefore be tolerated, that resort should be had to a

court of chancery, when the court of law, can afford equally as efficient relief, and in a mode much more prompt, expeditious and cheap. The decree of the chancellor, must therefore be affirmed.

NEAL v. SMITH.

1. The indorsee of a promissory note sued the guarantor thereof, upon a guaranty made simultaneously therewith, by a person not a party to the note, in the following words: "For value received, I guarantee the payment of the within note, after legal course and process against the maker S. Farley:" *Held*, that the action was maintainable.

WRIT of Error to the Circuit Court of Lowndes.

This was an action of assumpsit, by the plaintiff in error, against the defendant. The defendant pleaded, 1. *Non-assumpsit.* 2. The promissory note and guaranty described in the declaration have been materially altered without his consent, and are therefore not his acts, which last plea he verified by oath. On the trial, the plaintiff excepted to the ruling of the court. From the bill of exceptions, it appears that the plaintiff read as evidence, the promissory note with its endorsements, as follows, viz: "$2000—On the first day of January, 1842, I promise to pay Reuben Lanier, or order, two thousand dollars, with interest from the 14th of April next, for value received, 24th March, 1840.

STEWART FARLEY."

"Pay the within to James Neal, or order, May 8th, 1840.

R. LANIER."

"For value received, I guarantee the payment of the within note, after legal course and process against the maker, S. Farley.

JOHN N. SMITH."

The plaintiff then proved the hand writing of the defendant, and that the maker of the note was dead; that the defendant was his administrator, and had reported his estate insolvent before the commencement of this suit. The defendant then proved that the guaranty signed by him, was made and delivered to R. Lanier, on the day the note was made, and before the payee indorsed it. Upon this evidence, the court instructed the jury, that the plaintiff who was the payee's indorsee, could not maintain an action in his own name, against the defendant, upon his guaranty; and if they were satisfied that the proof showed such to be the relation of the parties, they should find a verdict for the defendant. The jury returned a verdict in conformity to the charge of the court, and a judgment was thereon rendered for the defendant.

Boling, for the plaintiff in error, argued, 1. The guaranty in its legal effect made the defendant liable as a joint promissor with the maker of the note, and the indorsement of the note gave a right of action to the plaintiff against the defendant. 2. If the defendant is not liable as a joint promissor, then he is liable on his contract of guaranty, to any one who might become the legal proprietor of the note. He cited 20 Johns. Rep. 365; 17 Wend. Rep. 214; 19 Id. 557, 202; 24 Id. 456; 1 Hill's N. Y. Rep. 256.

N. Cook, for the defendant, insisted, that the guaranty was a special contract between the guarantor and the payee of the note; was not assignable in itself and could not be transferred as an incident to the note, so as to give a right of action to the assignee in his own name; and cited Taylor v. Binney, 7 Mass. Rep. 479; Lamourieux v. Hewit, 5 Wend. Rep. 307.

COLLIER, C. J.—The only question presented is, whether the plaintiff is entited to maintain an action in his own name against the defendant? It is insisted, that the guaranty although made simultaneously with the note, does not enure to the payee alone; as it is not made in favor of any one *eo nomine*, it passes to any subsequent holder of the note, and is in fact a promise to him, on which he may bring a suit. On the part of the defendant it is argued, that the contract was made with the payee, although his name is not expressed; that it does not follow an assignment

of the note so as to vest a legal right in the indorsee, as against the guarantor, and is not in itself negotiable by the law merchant, or assignable under our statute.

In Lamourieux v. Hewit, [5 Wend. 307,] the question was, whether a subsequent holder of a promissory note, could sue in his own name or on a warranty indorsed thereon in these words: "I warrant the collection of the within note for value received," which accompanied a transfer made to Tuttle, a prior party. The judge who delivered the opinion of the court said, "I am of opinion that an action cannot be maintained on the guaranty in the name of the present plaintiff. The defendant was liable upon his guaranty, not as an indorser of negotiable paper, but as the party to a special contract, which might have been written on a separate piece of paper, as well as on the back of the note. The contract was made with Tuttle, and any action upon it must be in the name of Tuttle. Promissory notes are negotiable only by virtue of the statute; but this negotiable quality is not extended to any other instrument relating to the note." And it has been said that a special guaranty arising on a credit is not negotiable, and that a guaranty does not partake of the quality of the note on which it is indorsed, so as to pass and vest the legal interest in the holder, even though the latter should be payable to bearer. [Dean v. Hall; 17 Wend. Rep. 218.]

In Hough v. Gray, [19 Wend. Rep. 202,] the defendant simultaneously with the making of the note indorsed a guaranty thereon as follows: "This may certify that I guarantee the payment of the within note, dated 7th January, 1834." The consideration of the note was property sold by the payee to the maker, for which the former refused to give credit to the latter, unless the guarantor became his surety. Under these circumstances, the court considered the defendant as a co-maker; and held, that he was properly sued as such; but intimated that if his indorsement had been in blank, he would have been entitled to the privilege of an indorser. [See also Dean v. Hall, 17 Wend. Rep. 214, and cases there cited. But see Jordan v. Garnett, 3 Ala. Rep. N. S. 610; Milton v. DeYampert, Id. 648.]

In Watson's ex'rs, v. McLaren, [19 Wend. Rep. 557,] the declaration alleged, that the plaintiff was the owner and holder of a promissory note, particularly described; that on the day of its date for a valuable consideration received of the plaintiff, the de-

fendant made and subscribed an instrument in writing (which is set out literally.) This instrument describes the note, and is a general guaranty of its payment. The defendant moved for a non-suit for the following, among other reasons. 1. That the guaranty being a *separate* and distinct instrument, was *not negotiable*, and consequently an action thereon could not be maintained in the name of the plaintiff, who was not the payee. 2. That the guaranty was void, *no promise* being named therein; or if not void for that cause, it was not proved that the contract of guaranty was made with the plaintiff. 3. That the guaranty was void for want of a consideration expressed; that the words "for value received" do not import or show any consideration; that they are merely descriptive of the note referred to.

In respect to these objections, it was held, 1. That a separate guaranty of a negotiable note or bill, does not, like an acceptance, or indorsement, run with its principal, but must end where it began, like a bond or other chose in action; the suit therefore should have been brought in the name of the party in whose favor the contract was directly made. 2. The obvious intent of one who makes a general guaranty in which the name of no promisee is expressed, is to indemnify any man of the whole community, who should advance money on the credit of the note, and especially on the credit of the guaranty. By making a guaranty with the intent that the makers of the note should obtain money upon it, from any person that they pleased, the guarantor made them his agents to go in person, or by any other, and upon procuring the money, the promise is deemed in legal effect, to have been made to him who advances it. The guaranty was first a proposition to all the world, made on valuable consideration; and on its acceptance the contract became complete, and may be made good by averment. The intent is the question; and the promise may be shown by extrinsic proof. [See also Phillips v. Bateman, 10 East's Rep. 355; Watson v. Dodson, 3 Car. & P. Rep. 162; Gazelee J. Bradley v. Cary, 8 Greenl. Rep. 234; Brown v. Gilman, 13 Mass. Rep. 158; Douglass v. Wilkeson, 6 Wend. Rep. 637.] 3. That the words, "for value received" sufficiently express a consideration for the defendant's promise.

Where a note payable to A H C, or bearer, by C C P, was some days after its date, for a sufficient consideration, received of B F S, indorsed by T B, by which he guaranteed "the payment

and collection of the within note to him or *bearer;*" the court held, that the guaranty amounted to an absolute promise to pay the note, if the maker fails at the day. It is a new note for the payment of the money, and as it is made payable to S, or *bearer*, it is negotiable. [Ketchell v. Burns, 24 Wend. Rep. 456.] The court distinguished that case from Lamourieux v. Hewit, *supra;* upon the ground that the guaranty in the former case, was an absolute promise; but in the latter, the terms employed, "I warrant the collection of the within note for value received," imported a special agreement, that if the money could not be collected by the maker, the guarantor would pay it. [See 20 Johns. Rep. 365; 6 Conn. Rep. 315; 7 Mass. Rep. 479; 8 Pick. Rep. 423; 1 and 2 Ohio Rep. 499; Douthitt v. Hudson & Brockman, 4 Ala. Rep. 110. Curtis v. Smallman, 14 Wend. Rep. 231;] and in Luqueer v. Prosser, et al. 1 Hill's N. Y. Rep. 256, the plaintiff, sued as bearer of a joint and several promissory note, payable to Parsons or bearer, made by E & A: E & A and Prosser were sued as makers, the latter having signed a writing indorsed on the note in these words: "For value received I guarantee the payment of the within note, and waive notice of non-payment." The court held, that the note and indorsement made but one instrument, and that the obligations of all the promisors were identical throughout; that when the indorser says, "I guarantee the payment of the within note," he promises the future holder as well as the payee. "The authorities say rightly, he has done the same as if he had signed as surety. By reference, the guaranty becomes a part of the principal note. The guarantor becomes surety for the note, as it is payable *to bearer*, without declaring that he will engage to any other payee." [See Cumpston v. McNair, 1 Wend. Rep. 457.]

Chitty, in treating of a guaranty for the payment of a note or bill, remarks, that it is effectual only between the parties to it, and is "not transferrable at law, in equity, or in bankruptcy," and the action or proof upon it, must be on the special agreement, or the consideration which existed before, or passed at the time of the transfer. [Treatise on Bills, 9 Am. ed. 273.] Whether the learned author is speaking of a guaranty indorsed on the note or bill, or has reference to one written on a separate paper, he does not distinctly inform us, but we infer from all he says on the sub-

ject, that it is the latter he had in view. But the view which we take of the case makes this an immaterial inquiry.

The guaranty is in its legal effect a general undertaking by the guarantor, that if suit is promptly brought against the maker of the note, and the money not collected, or if the maker was insolvent, so as to render a resort to coercive measures unavailing, then he, (the guarantor) would pay it. He does not stipulate with the payee exclusively, but his promise is to the payee and every other person who shall subsequently become the legal holder of the paper. As no promisee is named in the guaranty, the obvious intention of the guarantor was, that it should enure to every person who should become the proprietor of the note, and be accessorial to it. This intention is clearly inferable from the nature of the engagement, and the terms employed. By failing to limit the guaranty to to the payee or other person, and engaging that the note should be paid, if the condition expressed was complied with, the contract of the guarantor is as unlimited as it respects the promisee, as if he had used the term *holder*, or *bearer*. But it is unnecessary to discuss this point at greater length, for the authorities cited, show that this is the correct view of the law.

The question suggested by the case of Ketchell v. Burns, *supra*, is, does the condition upon which the defendant's promise was to become absolute, exempt it from the influence of the principle we have stated? In that case, the guaranty was to "B F S, or *bearer;*" the court held, that the bearer of the note might maintain an action against the guarantor, and said that in Lamourieux v. Hewit, the guaranty was a special agreement, and could not be sued on by any one else than him, in whose favor it first became operative. The undertaking in the latter case, though not in terms, is in its legal effect, identical with that on which the action in the case at bar is founded, and if that case is acknowledged to be authoritative, it is decisive of the present. [See Grannis & Co. v. Miller & Wilkins, 1 Ala. Rep. 471; Douthitt v. Hudson & Brockman, 4 Ala. Rep. N. S. 110.]

In respect to a promissory note, it is said that under the law merchant, or as aided by the statute of *Anne*, it is essential that it should be payable at all events; and if it be not thus payable, it cannot be negotiated so as to invest the indorsee with a right of action in his own name. Without stopping to consider the law

on this point, it may be conceded to be as stated, without affecting, in any manner the question before us. The guaranty as we have seen is in favor of the holder of the note for the time being, who may be a different person, as often as the legal interest is transferred. We are not aware of any rule which would prevent any holder of the paper, from suing in his own name, on such a contract. The undertaking of the guarantor is quite as potent as if the term "bearer" were used both by him and in the body of the note, and the authorities applicable to such a state of fact, are directly in point in the present case.

A note payable to A B, or bearer, or to the bearer, is an original promise by the maker, to pay any person who shall become the bearer; it is therefore payable to any, and every person, who successively holds the note *bona fide*, not by virtue of any assignment of the promise, but by an original and direct promise, moving from the maker to the bearer. [Bullard v. Bell, 1 Mason's Rep. 252; Bank of Kentucky v. Wister and others, 2 Peters' Rep. 326; Chitty on Bills, 9 Am. ed, 178; Grant v. Vaughan, 3 Burr. Rep. 1522, *et post*; 1 Cranch's Rep. 389, Appendix.] In Gorgier v. Mieville and another, [3 B & Cresw. Rep. 45,] the same rule was considered applicable to a bond, or a specialty. [See also 3 Kent's Com. 59, 1st ed.] True, in Sayre v. Lucas, [2 Stewart Rep. 259,] it was decided by this court, under its old organization, that a specialty payable to A B, or bearer, was not transferable by delivery, so as to authorise the bearer to sue upon it in his own name. In that case, the court were not unanimous, but the judgment was dissented from by two of the judges; and although it has not been expressly overruled, subsequent adjudications lay down principles which are irreconcileable with it. Thus in Robinson v. Crenshaw, [2 Stewart & P. Rep. 276,] it was held, that a promissory note payable to bearer, was assignable by delivery, so as to invest the assignee with a right of action; that its assignability did not depend upon our statute "concerning the assignment of bonds, notes, &c., and for other purposes;" [Aik. Dig. 328,] but upon the contract of the maker, as expressed on the face of the paper. So in Carroll v. Meeks, [3 Porter's Rep. 228,] it was objected, that the bearer of a promissory note payable to a person by name, or bearer, could not maintain an action against the maker. This court thus answered the objection; "we deem it sufficient to say, that the note is an origi-

nal promise by the maker, to pay any person who shall become the bearer of it. The right therefore of the bearer to the action is the same which he would have had, if the word bearer had been omitted, and the note had been made payable to the plaintiff *eo nomine*, instead of designating another payee. If such had been the case, the plaintiff's right to sue, would have been undoubted.

We have thought it proper to consider the law thus at length, that it may be seen that the right of the bearer of paper to sue upon a writing to which he was not originally a party, is not influenced by the principles of commercial law, or dependent upon a statute; but arises out of the common law operating upon the terms in which a party has undertaken the performance of a duty. This being the case, it would seem necessarily to follow, that it was immaterial whether the contract was evidenced by a bond, note, or other form of security, or whether the promise was absolute or conditional in its inception. Whenever the condition was performed, the duty would become absolute in favor of the promisee, who was designated; or it would enure to any one who might become the bearer in virtue of the agreement of the promissor. We have already said that the case before us, is analogous in principle, to the case of a note payable to bearer, and as it would be competent for the bearer to sue in his own name, under such circumstances, the holder may maintain an action by showing that he is the legal proprietor of the note. The consequence is, that the circuit court erred in the charge to the jury; its judgment is therefore reversed and the cause remanded.

In illustrating this case by reference to a note or writing for the payment of money to the *bearer*, we have considered the right and the remedy as it existed at common law. We make this remark lest it may be supposed that the act of 1837, which declares that bonds, bills and notes payable to bearer, shall only be sued in the name of the payee or his indorsee, has been overlooked. This statute has no application to the case at bar.

SORELL AND ADAMS, EX'RS, &c. v. SORELL.

1. In a declaration upon a covenant, and performance necessary to be averred by the plaintiff, if the act to be performed involve a question of law, the *quo modo* must be pointed out; otherwise performance may be averred generally.
2. The assignment of the breach in covenant must conform to the covenant of the defendant, as set out; the breach must not be for more than is covenanted to be performed.

ERROR to the County Court of Dallas.

The plaintiffs brought an action of covenant, against the defendant, in the county court of Dallas, on articles of agreement between the testator of the plaintiffs and the said defendant. The declaration sets forth an agreement, that the testator, in his life time, in consideration of $5,400, to be paid by the defendant in three annual instalments, on the first of March, in each of the three years ensuing the 1st of January, 1839, had demised, and to farm let, to said defendant, all of his said lands, improved, with certain exceptions; and that said testator had also, for the same consideration hired to said defendant all his negroes, (whose names are given) for the same term; and had also hired all testator's hogs and cattle, and stock of every kind for the same term; that testator also covenanted with said defendant for the quiet enjoyment of the premises for the term aforesaid; and that said defendant bound himself, &c., at the expiration of three years, from and after the first day of January next after the date of said covenant, to deliver all the negroes so hired from said testator, unless they should die, abscond, or be stolen, &c., said defendant also bound himself to deliver to said testator a certain quantity of corn, a certain number of pounds of fodder, six work horses, valued, &c., also twenty-five head of stock hogs, also *twenty-five head of stock cattle, &c.*

The declaration contains a general averment, that "the testator in his life time, and the plaintiffs since his death, have well and truly performed and fulfilled all and singular the covenants and agreements, in the said articles of agreement mentioned, on the said testator's part and behalf to be done and performed."

The declaration further avers, that by said covenant, it became and was the duty of said defendant, to deliver to said testator, or the plaintiffs, his representatives, 1300 bushels of corn, 25000 pounds of fodder, six work horses, valued at $470—also seventy-five head of stock hogs—also, *twenty-five head of cattle, &c.*; and in the assignment of the breach avers, that the defendant had wholly failed and refused to deliver the said 1300 bushels of corn, the said 20,000 pounds of fodder, or the said six work horses, valued, &c., or *the said seventy-five head of cattle, &c.*

To this declaration there was a demurrer, which was sustained by the said county court, and that judgment is now assigned for error.

WM. HUNTER, for the plaintiff in error.
G. W. GAYLE, *contra.*

CLAY, J.—Two grounds are mainly relied on by the counsel for the defendant in error, in support of the judgment of the court below. 1. That the averment of the performance of covenants, on the part of the plaintiffs, is *general*, when it should have been *special.* 2. That the breach is erroneously assigned, so far as it alleges the non-performance of the defendant, in not delivering *seventy-five* head of cattle, when the covenant, as averred, was for the delivery of *twenty-five* head of cattle.

In regard to the first objection, it is clearly untenable. It is laid down in Chitty's Pleadings, 116, 117, that if the plaintiff shew a certain and exact performance, it is frequently sufficient to state it in general terms, without averring particularly how he performed, as on a promise to pay so much, as the plaintiff should expend for the officers of the army in such a suit—an averment that he spent so much is sufficient, without shewing for what officers in particular. So a substantial performance, in some instances, is held sufficient, as when the condition was to enfeoff, a conveyance by lease and release, was held sufficient; and a condition to deliver a will, was considered performed by delivering letters testamentary. In the case of Wright v. Tuttle, [4 Day, 313,] the plaintiff averred, generally, that he had kept and performed all the covenants in the indenture, on his part to be performed, it was held, not only sufficient, but the most proper form; and that the distinction was, that when the act involved in it a question of law,

viz: whether it was done as the law directed, the *quo modo* must be pointed out; but when it is a mere matter of fact, a general averment of performance is most proper. In the case at bar, the delivery of the property, to the defendant, was a mere matter of fact, and consequently, the general averment was sufficient.

It is true, as maintained by the counsel for the defendant in error, that the breach must agree with the thing to be done, or performed; and that when a plaintiff clearly assigns the breach of a covenant, which he has not set out, it would be bad. But, in the present case, the number of cattle delivered, and the number to be delivered, by the defendant, at the expiration of his term, is averred, in both instances to be *twenty-five head*—and the breach following immediately after the last averment, is for the non-delivery of the *said seventy-five* head of cattle. The *said* seventy-five head evidently refers to the preceding averment; and, instead of being the fault of the pleader, is doubtless a merely clerical misprision, which we do not think should be regarded as a material error.

Let the judgment be reversed, and the cause remanded.

PRICE, ET AL. v. PRICE.

1. A life estate being conveyed by deed in certain slaves to husband and wife, and upon the death of the survivor, remainder to the heirs of the wife—Held, that as there were no words securing a separate estate to the wife, the legal effect of the deed was to create a life estate in the husband, with a contingent remainder to the heirs of the wife; and that on the death of the wife before the destruction or termination of the particular estate, the remainder became vested in the heirs of the wife.

ERROR to the Circuit Court of Jackson.

Detinue, for certain slaves, by the plaintiffs against the defendant in error.

Upon the trial, the plaintiffs read in evidence a deed, as follows:

Know all men by these presents, that I, Richard Price, of Warren county, State of Tennessee, for and in consideration of the natural love and affection I have for my daughter Polly Woods, have bargained and delivered to her a negro girl named Mary, and her child named Patty, with their increase, to have and to hold the said negro slaves during the natural life of my said daughter Polly Woods and her husband Drury Woods, or the survivor of them, and at the death of said Polly and Drury Woods, the said negro slaves, with their increase, to be returned and delivered to the right and legal heir or heirs of the said Polly Woods, it being the intention of this instrument to convey a life estate in said slaves to my said daughter and son in law. And I do hereby warrant and defend the said negro slaves to the said Polly and Drury Woods, from the claim of all persons whatsoever.— In witness whereof, I have hereunto set my hand and seal, this 4th day of April, 1810.

Richard Price, (Seal.)

Plaintiffs then proved that the negroes sued for were the children of the slave Mary, mentioned in the deed of gift; that Drury Woods and his wife were both dead, without issue, he having survived her, and that they were the heirs at law.

The court charged the jury that the deed of gift vested the absolute property in the slaves in Drury Woods; that the plaintiffs could claim nothing in virtue of the remainder; but that upon the death of Drury Woods, they descended to his heirs at law.

The charge of the court is assigned for error.

Robinson, for plaintiff in error. The gift of the wife is inoperative, as it is not to her sole and separate use, and therefore vested in the husband. The remainder therefore, to the heirs of the wife was good, and did not unite with the life estate so as to give him the fee.

If the wife took an estate jointly with her husband for life, the remainder to the heirs of the wife alone, the remainder will not vest in the tenants for life, as the remaindermen do not claim as heirs to both tenants for life. [4 Cruise, title 32, ch. 22, sec. 13, 14, 15; 4 Kent's Com. 221.]

The rule in Shelly's case not applicable to this country; but if applicable at all, not to personal property.

S. Parsons, *contra*—Referred to and relied on the rule in Shelly's case as decisive of the case, within the precise terms of which, he contended, this case came. That the word "*heirs*" was to have its legal signification, unless clearly controlled by the accompanying words, which was not the fact here. [He cited Doe v. Fonnereau, Douglass, 505, note; 8 Yerger, 9 to 26; 9 ib. 209.]

ORMOND, J.—The gift of the slaves in controversy in this case, is to Polly Woods, "to have and to hold said negro slaves during her natural life, and that of her present husband, Drury Woods, or the survivor of them; and at the death of the said Polly and Drury Woods, the said negro slaves, with their increase, are to be returned and delivered to the right and legal heirs of Polly Woods; It being the intention of this instrument to convey a life estate in said negroes to my daughter and son-in-law."

Drury Woods and his wife have both departed this life, without issue, he being the survivor, and the question to be determined is, what estate did Drury Woods take under the deed?

It is impossible to doubt that it was the intention of the donor to give to the husband and wife a life estate only in the slaves, and that on the death of the survivor they were to go to the heirs of the wife; and the only question is, whether there is any rule of law which will thwart this intention, and give the husband the entire interest in the slaves.

The obstacle to carrying into effect the intention of the donor is, by the counsel for the defendant in error, supposed to result from the use of the word *heirs*, in the remainder over; the legal effect of which he insists is, to convert the life estate of the ancestor into the absolute title to the slaves.

The rule of law relied on is an ancient canon of the common law, known as the rule in Shelly's case. [1 Rep. 93.] "Where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in *fee* or in *tail*, the terms *heirs* are words of limitation and not words of purchase." The effect produced by the rule is, that in all cases coming within its influence, the remainder is merged in the particular estate, which is thereby enlarged or expanded into an estate in *fee* or in *tail*, so as to permit those in remainder to take either as heirs general, or as heirs of the body of the first taker, which they could not do if

the ancestor took only an estate for life. When, however, it is apparent that the words "heirs" or "heirs of the body" are used as descriptive of individuals and not of the general line of heirs, they are considered words of purchase; that is, they indicate the object, and limit the scope of the gift; and although those to whom the gift is thus secured may be heirs of the first taker, they do not take as heirs, but directly from the donor, and therefore take by purchase.

What shall be a sufficient indication of this intention, so as to render the rule inoperative. is a point of no small difficulty, and has given rise to more controversy than any other question in our law. It appears, however, to be settled, that the word heirs, or heirs of the body, when used alone and without explanation, are always considered as words of limitation, and not words of purchase—that if it appears that by the term heirs, the donor meant the general line of descent from the ancestor, the rule will prevail, no matter how strong the intention may appear to make them take as purchasers. In Jones v. Morgan, [1 Bro. C. 220,] Lord Thurlow gives the reason, "that if the donor meant that every other person who should be *heir* should take, he meant what the law would not suffer him to do, *to make the heir take as purchaser.*" The learning on this subject has been exhausted by Mr. Fearn, in his work on Remainders. [See also the recent work of Hayes on Limitation, and the tables constructed by him, in which the leading authorities are collated and contrasted. Law Library, vol. 7; also, the plain and satisfactory view of Chancellor Kent, in the 4th vol. of his Commentaries, 206.]

It was also an ancient rule of the common law, that a remainder could not be limited upon a chattel, but that a gift for life carried the entire interest. This was however afterwards permitted by way of executory devise, and finally by deed. [2 B. Com. 398; 1 Thomas' Coke Litt. 516, 20, a, Harg. note 5; 2 Kent's Com. 285.]

To apply the law to this case. A gift of land to husband and wife for their lives, with remainder to the heirs of the wife, would, by the operation of the rule in Shelly's case, by annexing the remainder to the life estate, give the wife a fee simple title. [Alpass v. Watkins, 8 D. & E. 516; 4 Cruise Dig. tit. 32, ch. 22, § 17.] But the subject of the gift in this case is personal property; and as the estate is not expressed to be for the separate use

of the wife, upon well established principles, the marital rights of the husband immediately attached, so as to vest him with the entire life estate. The legal effect of the deed, in this aspect, was a life estate in the husband, with remainder to the heirs of the wife; and as the heirs of the wife are not necessarily the heirs of the husband, and in fact are not so in this case, the limitation was good as a contingent remainder, which upon the death of the wife before the destruction or termination of the particular estate, became vested in her heirs. [2 B. Com. 169; Fearn on Rem. 8.]

It may be objected that this is entirely departing from the deed, which contemplates the wife as taking a life estate; but it must be observed, the question is not merely what the donor intended; but what is the legal effect of that intention when ascertained.

It is perfectly clear that he intended not only that the wife should jointly, with her husband, take a life estate in the slaves, but also that her heirs should take a *vested* remainder in the slaves, the enjoyment of which was postponed until the death of herself and husband; yet neither of these intentions can be carried into effect. Not the first, because a gift to the wife, without qualification, is in law, a gift to the husband; nor the second, because it is plain he intended that the *heirs* of the wife should take as such, and did not intend by the use of that term, to limit the estate to certain individuals then existing; but on the contrary, designed that the person or persons who might be the heir or heirs of the wife at her death, should take the estate in remainder; or in other words that they should take both as heirs and as purchasers. This intention, it has been shown in the preceding part of this opinion, is one which the law will not enforce, and we are therefore to consider what is the legal effect of the deed, the intent being such as the law will not carry into effect. As already stated, it is to give the husband the entire life estate, instead of a joint estate, between him and his wife; and a contingent instead of a vested remainder to her heirs. It was at the option of the husband whether this remainder should ever vest, as it was certainly in his power to destroy it by a sale of the slaves before the death of the wife, the contingency upon which it was to vest. This, it appears, he did not think proper to do, and thereby indirectly permitted the intention of the donor to be effectuated.

It results from this examination, that the court erred in its charge to the jury, and its judgment is therefore reversed, and the cause remanded.

LEIGH v. SMITH.

1. *Semble:* Where a plaintiff in attachment moves for judgment upon the written answer filed by a garnishee, it will be inferred that he accepted the answer, and waived an examination in open court.
2. Although a garnishee is required to appear, within the first four days of the term to which the garnishment is returnable, and answer on oath, &c.; yet no judgment can be rendered against him upon the answer, before the plaintiff has recovered a judgment against the defendant in attachment.
3. Where a garnishee has appeared and admitted in writing, that he is indebted to the defendant in attachment, it is more regular to render a judgment against the defendant and garnishee at the same term; but if it has been entered against the defendant only, it is competent for the court, at a subsequent term to render judgment against the garnishee; and this, although he has not been notified since the cause was disposed of as to the defendant, that a judgment would be moved for against him.

WRIT of Error to the Circuit Court of Lawrence.

On the fifth of September, 1836, the defendant in error, caused an attachment to be issued against the estate of Achilles Barnett, returnable to the circuit court of Lawrence, which was levied in the hands of the plaintiff in error, by summoning him as a garnishee. On the 19th of the same month, the garnishee appeared in open court, and answered on oath, "that he holds in his hands the sum of two thousand and eighty dollars in cash, belonging to the defendant." The defendant in attachment appeared and pleaded, and at the term of the circuit court holden in September, 1841, a judgment was rendered against him for twelve hundred and sixty dollars damages, and five hundred and fifty-four 16 1-4-100 dollars costs; but no judgment was then rendered against the garnishee. In October, 1841, an execution was issued against the garnishee, upon his answer admitting an indebtedness; this execution was levied, and a forthcoming bond taken. The bond being forfeited, an execution was issued thereupon, which upon the petition of the garnishee was superseded, and quashed at the September term, 1842, and at the same term, a judgment *nunc pro tunc* was rendered against the garnishee, for the amount of

the recovery against the defendant in attachment. To revise this last judgment, a writ of error has been sued out.

J. A. Campbell, for the plaintiff in error.
S. Parsons, for the defendant.

COLLIER, C. J.—The act of 1833, which was a substitute for all pre-existing laws on the subject, requires that a person summoned as a garnishee, shall appear at court within the first four days of the term, and answer on oath, what he is indebted to the defendant, &c. Upon this answer, the court is authorised to enter judgment against the garnishee for all sums acknowledged to bedue, &c.

Although the statute makes it lawful to render judgment upon the appearance and examination of the garnishee, yet it has been decided, that this cannot be done until a judgment is rendered against the defendant in attachment; for that furnishes the only warrant for condemning the money in the garnishee's hands. [Gaines v. Beirne & McMahon, 3 Ala. Rep. N. S. 114.]

A debt attached in the garnishee's hands, it has been said should be considered as the defendant's property; [Duncan v. Ware's ex'rs, 5 Stew't and P. Rep. 119,] that the summoning one indebted to the defendant, is in legal effect, a levy of the attachment upon property, and equivalent to the personal service of process. [Thompson v. Allen, 4 Stew't and P. Rep. 184.]

The statute cited, authorises the rendition of a conditional judgment against the garnishee, if upon being called, he fail to appear and answer within the time prescribed; yet it has been holden that the neglect of the plaintiff to take such judgment, will not operate a discontinuance of the garnishment, so as to prevent any proceeding against the garnishee at the succeeding term. [Robinson & Davenport v. Starr, 3 Stew't Rep. 90.] And in Greer v. McGehee, [3 Porter's Rep. 398,] it was determined that under our statute no cause will be discontinued for the failure to enter a special continuance, that the effect of the statute is tacitly to do that, which such an order would effect.

In the present case, the attachment was only levied by summoning the plaintiff in error, as a garnishee, and the admission by him of an indebtedness, was sufficient to give jurisdiction to the circuit court. But it is objected that as the garnishee answered

in writing, and there is no evidence of the answer having been accepted by the plaintiff in attachment, it should have been entirely disregarded. It is true that the garnishee cannot avoid an examination in open court, by making upon oath and filing his answer to the inquiries contained in the process of garnishment; but the plaintiff may, as we have seen, waive his right to examine him by accepting such an answer. If the plaintiff proposes the answer, as the basis for the action of the court, this is sufficient to show that he accepted it. We need not, however, place the legality of the answer upon its acceptance by the defendant, for the form of it, we think indicates that it was drawn up in open court, and the attestation of the clerk affirms that it was there verified. Taking this to be true, it conforms to the statute, and the inference will be, that the answer as stated, is the result of an examination, or else all special inquiries were waived.

The levying an attachment in the hands of a debtor, is equivalent to the seizure of the defendant's property, and the rendition of a judgment against the garnishee, is in effect, but an order for an execution by which the debt already attached may be collected. The proceeding against the garnishee, is not regarded in the primary court as an independent suit, but as a mere consequence or appendage to the action, and intended to make it available. In this view we think that it is entirely competent for the court rendering judgment against the defendant in attachment to perfect the proceeding by condemning a debt admitted by a garnishee to be due, and rendering a judgment so that an execution may issue; and this too, although one or more terms may have elapsed after a judgment shall have been recovered in the cause. The judgment against the defendant impliedly assumed that the garnishee was indebted to him, as such an assumption was essential to the jurisdiction of the court, and the subsequent proceeding was intended merely to carry out and perfect what had been done but in part.

It was not necessary to the legality of the judgment against the garnishee, that it should have been entered *nunc pro tunc;* in fact as no order was made upon the matter at the previous term, perhaps such a judgment would not be technically correct; yet it cannot be vitiated by form, and so much as is unnecessary may be rejected as surplusage.

In respect to the objection, that it does not appear that notice was given to the garnishee, that a motion would be made for a judgment upon his answer, it may be remarked, that the levy of the attachment had never been discharged in fact, and what we have said, shows that the judgment against the defendant, did not operate to discharge it. The garnishee was then in court, and no notice was necessary. In Wilkerson and another v. Branham, at the present term, it was held, that an order permitting the substitution of a declaration, at a term subsequent to that at which judgment was rendered, was not erroneous, because no notice was given to the defendant. And the court cite with approbation the lessee of Walden v. Craig's heirs, et al. [14 Peters' Rep. 154,] in which it is said that the parties, after judgment, are still in court, on a motion to amend, or on any other motion or order which may be necessary to carry the judgment into effect; and that the general rule which declares a motion to be necessary to enable the court to exercise jurisdiction, does not apply to such a case.

The consequence is, that the judgment of the circuit court is affirmed.

ORMOND, J.—Not sitting.

GEE v. PHARR.

1. The words "grant, bargain, sell," must all be used in a deed, to imply a covenant of the grantor, against incumbrances, done or suffered by him, within the meaning of the "act respecting conveyances," sec. 20, approved March 4th, 1803.

ERROR to the Circuit Court of Wilcox.

The plaintiff brought an action of covenant against the defendant, in the Circuit court of Wilcox county, founded on a deed of

conveyance, executed by the latter to the former, by which the defendant "bargained, sold, released, aliened, and confirmed unto" said plaintiff, certain tracts of land. The plaintiff avers, in his declaration, "that by virtue of the legal operation and effect of the words *bargain, sell, release, alien and confirm*, contained in said deed, the said defendant did then and there covenant, to and with said plaintiff, that he the said defendant was seized of an indefeasible estate in fee simple, in said premises, freed from incumbrances, done or suffered from said defendant." The breach assigned is, that at the time of the execution of said deed, *the premises were not freed from incumbrances, done or suffered from said defendant*—but that the defendant had, before that time, conveyed to one John Danally and his heirs, the privilege of cultivating one of the quarter sections embraced in his deed to the plaintiff—that Danally was in the possession of and cultivated said quarter section, and refused to surrender it, without compensation to the amount of six hundred dollars, which plaintiff was compelled to pay to said Danally, in discharge of said incumbrance.

To this declaration there was a demurrer, filed by the defendant, and afterwards sustained by the court—which judgment of the Circuit court is now assigned for error.

Wm. Hunter, for plaintiff in error.
Peck & Clark, *contra*.

CLAY, J.—The question presented in this case, turns upon the construction of sec. 20 of the act of 1803, "respecting conveyances." [Aik. Dig. 94, § 33.] That section provides that—"In all deeds to be recorded, in pursuance of this act, whereby any estate of inheritance in fee simple, shall hereafter be limited to the grantee, or his heirs, the words grant, bargain, sell, shall be adjudged an express covenant of the grantee, his heirs and assigns, to-wit: that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances, done or suffered from the grantor, (except the rents and services that may be reserved,) as also for quiet enjoyment against the grantor, his heirs and assigns; unless limited in express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns

may, in any action, assign breaches, as if such covenants were expressly inserted, &c."

The counsel for the plaintiff in error contends, that although the word "grant" is not in the deed, the words "bargain and sell" are, of themselves sufficient to constitute a covenant, against prior incumbrances, created by the grantor, and existing at the time of the conveyance; and, indeed, that such would be the legal effect of any one of those words. If such a covenant exist, at all, in the present case, it is understood to be agreed on all hands, that it is only by force of the statute referred to. By the common law, neither of the words, "grant, bargain, sell," nor did all of them together imply such a warranty. It is laid down by Lord Coke, in his commentary on Littleton, that the word "*dedi* is a warranty in law to the feoffee, and his heirs during the life of the feoffor, but *conussi* in a feoffment, or fine, implieth no warranty." [See 2 Thomas' Coke, 204.] So, Mr. Butler, in his note VI, in the appendix to the same volume. p. 542, remarks, "from the passages here referred to, it most clearly appears, that the word *grant*, when used in the conveyance of an estate of inheritance, does not imply a warranty, &c." In an estate of inheritance, when the fee passes, the word grant is neither *a covenant in law, nor a warranty.* The word grant applies to incorporeal hereditaments, *which lie in grant*, and *not in livery.* [Ibid. 2 Chit. Blac. 233.] Nor do the words *bargain* and *sell* belong properly to the conveyance of an estate of inheritance, at common law. It was a species of conveyance, introduced by the statute of uses, [27 H. 8, ch. 10,] which in pleading is called the statute *for transferring uses into possession.* [1 Saund. R. 251, n. 2; 2 Chit. Blac. 250.]

From this view of the subject, it follows that the section of the act of 1803, above cited, was intended to give an effect to the words "grant, bargain, sell," which they did not possess at the common law. In other terms, the statute undertakes to impart to those words new virtue—an efficiency, before unknown to them. It is believed to be a sound rule of construction, that, when a statute alters the common law, the meaning shall not be strained beyond the words; except in cases of public utility, when the end, or object of the act appears to be larger than the enacting words. [6 Bac. Abr. 383–4.] Our statute not only alters the common law, but, inasmuch as it creates covenants for the par-

ty conveying, by mere implication, its tendency may be regarded as somewhat dangerous—as calculated to entrap the ignorant and unwary. Hence, the rule seems to apply with great force, that its sense should not be strained beyond the words employed. In Pennsylvania, where a statute like our own exists, the courts have determined that those words—*grant*, *bargain* and *sell*—did not amount to a general warranty, but merely to a covenant, that the grantor had not done any act, nor created any incumbrance, whereby the estate might be defeated. [Grantz v. Ewalt, 2 Binney's R. 95.] And this strictness of construction is approved by Chancellor Kent, in his 4 Com. 473—"because the words of the statute are (by it) divested of all dangerous tendency."—He further remarks, "it may not be very inconvenient, that those granting words should imply a covenant against the secret acts of the grantor; but, beyond that point, there is great danger of imposition upon the ignorant and the unwary, if any covenant be implied, that is not stipulated in clear and precise terms." [Ibid.] Such being the character and tendency of the statute in question, it should receive a strict construction; its words should not be extended beyond their obvious meaning; nor should the contemplated covenants be implied by less than all the effective words used in the statute. If the word *grant* can be dispensed with, in the creation of the covenants named in the act, so might the word *bargain*, or the word *sell*—and the introduction of either of those words into a deed, might be made to operate as a covenant under the statute, when it was perhaps never thought of by either of the parties. The Legislature have not said that either of the words, when used alone, shall be adjudged such a covenant, as that contended for by the counsel for the plaintiff, but they have merely declared that "the words grant, bargain, sell," shall be so adjudged. There is certainly nothing in the terms, or apparent object, of the act, which requires us to give to one, or two, of those words, as much force, or effect, as pertains to all of them; and the safer construction will be, to require all, to imply such important covenants, as that the grantor was seized of an indefeasible estate in fee simple, freed from incumbrances, and for quiet enjoyment. These views bring us to the conclusion, that the court below was right in sustaining the demurrer to the declaration.

Let the judgment be affirmed.

STARKE & MOORE v. KEENAN'S EX'RS.

1. A written acknowledgment by an acting executor, that a claim was presented within the time required by law, is evidence of the fact of presentment; and the subsequent resignation of the executor, will not impair its value as evidence, and make it necessary to call the executor as a witness.

ERROR to the County Court of Dallas.

This was an action of assumpsit, by the plaintiffs, against the defendants in error. The defendants, among other pleas, interposed the plea of the statute of *non-claim*. To prove a presentation of the claim sued on, within the time required by law, the plaintiffs offered in evidence, the written admission of F. S. Blount, one of the executors of the deceased, who had resigned subsequently to its execution, but who was still alive, and within the jurisdiction of the court. The court, on motion of defendant's counsel rejected the evidence, on the ground, that it was not the best evidence in the power of the party to produce; to which the plaintiffs excepted, and which is now assigned as error.

G. W. GAYLE, for the plaintiffs in error, cited 3 Day. 309; 1 Taunton, 104; 15 Johns. 409; 4 ib. 230; 7 Conn. 319; 4 S. & R. 174; Greenl. Ev. 125, 221–3; 3 Stewart, 288.

HUNTER, *contra*. The admissions of one, not a party to the record, and who may be called as a witness, cannot be given in evidence. [13 Mass. 201; 6 Conn. 28; 2 N. H. 491; 6 Porter 32; 12 Vermont, 178; 1 Phil. Ev. 255.]

ORMOND, J.—The objection urged to the testimony rejected by the court is, that as it was the mere admission of the existence of a fact, by one, who not being a party to the record might have been examined as a witness, it was mere *hearsay*, and was therefore properly excluded.

The general rule, certainly is, that admissions by persons who are not parties to the suit, though made against their interest, can-

not be given in evidence, but the rule does not apply to this case. The executor who made the written admission of the presentment of the claim here sought to be enforced, although not a party to the suit, having resigned his appointment since the presentment was made; at the time it was made, represented the deceased, and had full power and authority to act upon the subject.

Where there are more executors than one, there may be acts to be done, which require the concurrent action of all; but in relation to the point here presented, one has authority to act for all. [Acre v. Ross, 3 Stewart 288.] The person appointed by law to receive the presentment must have authority to acknowledge that such presentment was made, and this acknowledgment cannot be deprived of its efficacy, as evidence by his subsequent act. So each of several executors has authority to receive payment of debts due the deceased, and it would scarcely be contended in such a case, that the resignation of the executor, to whom the payment was made, would prevent his receipt from being evidence of the fact of payment, and make it necessary that the executor should be called as a witness, and yet there is no difference in principle between the two cases. If there be any difference between these, the case supposed is not so strong as the one at bar, as the claim *must* be presented or it is barred.

The statute does not, it is true, require the executor to acknowledge the fact of presentment, but it would be absurd to suppose that he had not the power to do so. The object of evidence is to establish the existence of facts, but when the fact is admitted, there is no necessity for further proofs.

It results from what has been stated, that the court erred in the rejection of the written acknowledgment of one of the executors, that the claim had been presented, and its judgment is therefore reversed, and the cause remanded.

SIMS & McQUEEN v. PRYOR & SAXON.

1. P & S gave a receipt, acknowledging that they had received from S & M, all their books of account, notes, &c. and stock of goods, valued at twelve thousand dollars; also their right, title, &c., to certain real estate, valued at three thousand dollars, "for the payment of the following notes," the amount and dates, and time when due, are particularly stated; the aggregate sum of which is nearly twelve thousand dollars: *Held*, that the writing did not indicate an absolute sale of the books of account, &c., but showed that they were received as a security for the payment of the notes of which P & S, were previously in possession; that it was competent for S & M, to show that P & S, had realized a sum more than sufficient for that purpose, and to recover the excess.
2. It is not error in a court to refuse to admit proof which is merely affirmative of the legal interpretation of a writing adduced as evidence; if either party desire an opinion from the court, as to the meaning or effect of the paper, it should be sought by a prayer for instructions to the jury, or in some other mode equally direct, unless the court by its decision renders this course of procedure unnecessary.

WRIT of error to the Circuit Court of Autauga.

This was an action of assumpsit, by the plaintiffs in error, against the defendants. The declaration is drawn without much regard to technical precision, and contains counts for goods, wares, and merchandize, sold and delivered; land sold and conveyed, and "promissory notes, books of account, vouchers, bills, bonds, accounts, claims, papers and claims in action due from divers persons, amounting in all to the sum of fifteen thousand dollars." The cause was tried on the plea of *non-assumpsit*. On the trial, the plaintiffs excepted to the ruling of the presiding judge, from which it appears, that the following writing was adduced, viz:

"Syllacogga, Oct. 17, 1837.

Rec'd from Sims & McQueen, all their accounts, books, papers, vouchers and claims at and in the store-house at Syllacogga, valued at four thousand dollars; also their stock of goods at the same place, valued at four thousand dollars; also their books of account, notes, vouchers and stock of goods at Tallashatchey, valued at four thousand dollars; also their right, title and interest to all the real estate bought by the said Sims & McQueen from

E. C. Wilson and Charles Cottingham, at Syllacogga, valued at three thousand dollars, for the payment of the following notes, viz: one for $1087 33-100, due 5th May, 1837; one for $1087 33-100, due 5th Feb. 1837; one for $811 9 1-100, due 2d Jan. 1837; one for $150, due 22d July, 1837; one for $2000, due 1st September, 1837; one for $6017 88-100, due 1st February, 1838; one for $107 94-100, due 24th January, 1837, and one for $425, due 21st Sept. 1837.

JAMES BRADFORD, Agent
for Pryor & Saxon, Assignees
of Felder & Bradford."

The plaintiffs introduced proof tending to show, that James Bradford was the agent of the defendants, and in that character purchased of the plaintiffs, the goods, &c., mentioned in the writing set out above; they also proposed to prove, that at the time of making the writing, it was agreed that the defendant was on a settlement of the notes described therein, to pay to the plaintiffs any surplus which might remain of the notes, accounts and other property then transferred. To the admission of this last evidence, the defendants objected, and their objection was sustained, the court deciding that the writing could not be explained, by evidence showing that it was verbally agreed, at the time it was made, that the notes, &c., remaining, or their proceeds after satisfying the debts in consideration of which the transfer was made, were to be returned or paid to the plaintiffs. A verdict was returned for the defendants, and thereupon a judgment was rendered.

L. KENNEDY, for the plaintiffs in error.
PRYOR, for the defendants.

COLLIER, C. J.—This cause was submitted without argument or brief, but we infer that the ground on which the circuit judge rejected the evidence offered by the plaintiffs was, because he supposed the writing which had been adduced, established an absolute sale of the goods, &c., and could not be contradicted or varied by "parol contemporaneous evidence." The terms employed in the paper are not those which are usual in a bill of sale, or other instrument, by which one person divests himself of the title to property in favor of another. It merely acknowledges

that the defendants have received of the plaintiffs, books of accounts, notes, &c., goods and lands, stating the places where they were, and the estimated value of each of these objects, at the respective places, amounting in the aggregate to the sum of fifteen thousand dollars. The purpose for which this property was transferred to the defendants, was the payment of notes, amounting to about twelve thousand dollars. There is no stipulation that the plaintiffs are to be discharged from liability to pay the notes, if the defendants should not realize a sufficient sum for that purpose. Again, the estimate placed upon the property put under defendants control, seems to have been merely conjectural, without any regard to accuracy, as indicated by the manner in which it is stated; nor does the writing provide for, or contemplate a conveyance of the real estate to the defendants. All these circumstances seem to us to lead to the conclusion that the parties did not regard the transaction as a sale, or if they did, they have expressed themselves in terms from which no other inference can be drawn, than, that the intention was to furnish a security for the payment of the notes. This is the construction which results from the terms used, when understood in their plain, ordinary and popular sense. Thus interpreted, the writing would not be contradicted, varied or explained, or made to indicate a purpose different from what the law would deduce from the interpretation we have given it, by the admission of the evidence excluded.

The implied agreement on the part of the defendants, is to collect the accounts, &c., sell the goods &c., and appropriate the money to the payment of the notes intended to be provided for, and after the notes were paid, to return to the plaintiffs, or their order *on demand*, whatever surplus might remain in their hands. According to the case of Brooks and Brown v. Maltbie, [4 Stew. & P. Rep. 96,] the inference from the writing is so conclusive, that it was intended merely to evidence a security for the payment of debts, instead of an actual payment, as to exclude proof to show, that if there was a balance unpaid, it could not be recovered after an appropriation of the proceeds of the property transferred to the defendant. But the bill of exceptions does not inform us why it became necessary or proper to introduce the evidence referred to therein; nothing more is said, than it was offered and excluded; and as it was merely affirmative of what the law itself inferred from the writing, we cannot conceive how the

plaintiffs could have been injured by its exclusion. Is it allowable for a party who produces a written contract which is not disputed, to prove by witnesses that the contract was such as it imports on its face? Is the court obliged to submit to the unnecessary infliction which such evidence would impose on its time; or can the party be prejudiced by the rejection? These questions we think must receive a negative response. If the plaintiffs had offered evidence to show what surplus was left in defendants hands after the debts were paid, or if the court had charged the jury that the writing shewed a sale, and that the defendants were not liable, then the legal question sought to be raised would be fairly presented. But such is not the posture of the case, and we must decide it upon the record.

The remark of the court, that the writing could not be explained, by showing that it was verbally agreed the defendants should be liable for any surplus remaining in their hands after the debts were paid, can have no influence upon the decision which was made. It only seems to show what was the ground of the opinion of the circuit judge, and nothing more. It could not have prejudiced the plaintiffs case before the jury, for it was not addressed to them. Nor was it a formal adjudication of the legal principle it asserts, but it was only an erroneous reason for a correct conclusion, which it has been often held, will not authorise the reversal of a judgment.

If the plaintiff, could have shown a surplus in the defendants hands after the payment of the debts intended to be provided for, they should, as already remarked, have offered evidence for that purpose. In the absence of such proof, it cannot be assumed, that they were prepared with, and would have adduced it, but for the remark of the judge, to which we have referred; and having failed to offer such evidence, it is impossible to know, or conjecture that, that remark was productive of injury.

From what we have said, it results that there is no error in the record, and the judgment of the circuit court is consequently affirmed.

VAN ARSDALE & CO. v. HOWARD.

1. Can a mortgage, which has been referred to, and admitted by the mortgagor and mortgagee, in the course of their testimony, be admitted as evidence, without having been proved by a subscribing witness, notwithstanding the objection of the plaintiff, who is not a party to the mortgage?
2. The concealment, or non disclosure of facts, to amount to a fraud, must be of those facts and circumstances, which one party is under some legal or moral obligation to communicate to the other; and which the latter has a right, not merely *in foro conscientiæ*, but *juris et de jure* to know.
3. An omission to communicate, or a concealment of facts, in such cases, should be attended by some evidence of trust or confidence, reposed by one party in the other, to constitute a fraud.

This is an action of assumpsit, brought by the plaintiffs against the defendant, on a promissory note, given by one A. G. Marshall, and the defendant, as his security, to the plaintiffs for the payment of twenty three hundred and eleven dollars 56-100, negotiable and payable at the Bank of Columbus. The action was commenced in the county court of Russell, but transferred to the circuit court, by consent. The declaration is in the usual form. The defendant relied, for his defence, on six pleas. On the first, being *non assumpsit*, issue was taken; and also on the 4th, which alleged that the note was given without any consideration good and sufficient in law. To all the other pleas, the plaintiffs, by their counsel, demurred. The court sustained the demurrer to the sixth plea, but overruled those to the 2d, 3d, and 5th pleas; upon which issues were afterwards taken, and the case submitted to a jury.

Upon the trial of the cause, a bill of exceptions was taken, setting forth that evidence was given, going to prove, that the defendant was security, in the note sued on, for said Marshall—that Marshall in the early part of the year 1838, bought a stock of goods of one Sorsby, and had given one Preston as his eodorser for the purchase, amounting to about ten thousand dollars worth: that, to secure said Preston on his endorsement, said Marshall had executed to him a mortgage on his said stock of goods, and the profits and accounts to arise from the sale thereof, which was re-

corded in Muscogee county, Georgia, where said Preston and Marshall both resided, and where the contract was made; but it was not shewn that by the law of Georgia, such an instrument was required to be recorded.

It was further proved, that afterwards the said Marshall obtained a letter of introduction, or credit, from said Preston, directed to the plaintiffs in the city of New-York; and, upon the faith of said letter, purchased an additional stock of goods from said plaintiffs, and brought them to the said county of Muscogee, Georgia, and there placed among the goods originally purchased by him of the said Sorsby, and upon which said Preston held said mortgage.

It was also proved, that after the purchase of said goods in New York from said plaintiffs, by said Marshall, said plaintiffs sent out to Muscogee county, Georgia, to the said Preston, for settlement, two notes on said Marshall, one past due, and the other not then due—with a request that said Preston would settle said notes with said Marshall; and it was likewise proved that said Preston did agree with said Marshall, to take from him a note with security, and that he should pay the note, thus taken, when it fell due, with other notes.

It was further proven, that, a short time after this agreement was thus entered into, an agent of the plaintiffs, from the city of New York, came into the county of Muscogee, Georgia, and, while there, Marshall obtained the signature of said defendant to said note, here sued on; and that said Preston also knew, that said defendant was about to sign said note for said Marshall, and permitted said defendant to sign it, without letting him know that the goods then in possession of said Marshall, had been, by said Marshall, previously mortgaged to said Preston.

It was also proved, that, in a short time after the execution of said note by said defendant, said Marshall turned over his entire stock of goods, amounting to about fourteen thousand dollars, to said Preston; and it was further proved that, after this, said Preston had the note of said Marshall and defendant credited with $265, although, at the time it was executed, it was delivered to the agent of the plaintiffs then in Columbus, Georgia, by him carried to New-York, and subsequently remitted to the county of Muscogee, Georgia, for collection.

The defendant then introduced the mortgage from Marshall to Preston, which bore on it the attestation of two witnesses. The plaintiffs objected, generally, to its being read, but did not state their ground of objection; but the court permitted it to be read, it having been spoken of and admitted by both the mortgagor and mortgagee in their testimony; to which decision the plaintiffs excepted.

Upon these facts, the court charged the jury, that, if they believed from the evidence, that Preston was the agent of the plaintiffs, to secure the notes due them by Marshall; and took the note sued on, with the defendant as security; and, at the time had a mortgage on all the effects of Marshall to secure himself personally; and did not inform the defendant of the existence of said mortgage; and that said defendant at the time he signed said note for said Marshall, was not in any manner notified of said mortgage, that then it was a concealment which amounted to a fraud on the defendant, and they must find for the defendant; to which charge the plaintiffs excepted, &c.

There was a verdict for the defendant; and, from the judgment rendered thereon, the plaintiffs have brought the case here by writ of error; and have made the following assignment:

1. The court erred in overruling the demurrer to the second plea.

2. The court erred in overruling the demurrer to the third plea.

3. The court erred in overruling the demurrer to the fifth plea.

4. The court erred in the matters set forth in the bill of exceptions.

Heydenfeldt, for the plaintiffs in error.

Belser & Harris, *contra*.

CLAY, J.—The principal questions presented by this record, are believed to arise out of the bill of exceptions; because that sets forth the facts of the case, upon which, with the principles here to be laid down, the fate of the cause must ultimately be decided. Hence, although embraced by the last assignment of errors, they will be first considered.

The first point raised upon the bill of exceptions, is, whether the court erred in suffering to go to the jury, as evidence, the mortgage from Marshall, the principal in the note sued on, to Preston, when it bore the attestation of two witnesses, neither of whom had been introduced, or given evidence of its execution—nor had the absence of either been accounted for. To sustain the opinion of the court admitting it, the counsel for the defendant in error relies on the ground, that the plaintiffs below objected generally, only, to its being read, without stating their grounds of objection, and that it had been spoken of and admitted, by both the mortgagor and the mortgagee. We do not think either of those grounds sufficient to justify its admission. It was not the ground of the action, the plaintiffs were not parties to it, nor had it been set out in the pleadings so specifically, as to have called on them to admit, or deny its execution. The fact of its having been spoken of and admitted by the mortgagor and mortgagee, (neither of whom was a party) in the course of the trial, was not a substitute for the evidence of a subscribing witness, and could not bind the plaintiffs, who were not parties to it, and made no admissions in relation to it. The first step, to be taken by a party, who introduces an instrument of writing, collaterally, is to prove its execution by the subscribing witness, if it have one, and, if not, to prove the hand writings of the individual or individuals, by whom it was executed, or in some other legal mode establish its genuineness. Until he offers legal proof of its execution, it is enough to object generally—he has not placed himself in a position to claim any other objection; for, until then, he has not proved even the legal existence of such a contract. This general rule is held to be indispensable, by the highest authority, even when it was proved that the obligor had admitted that he executed the bond; and though the admission was made in an answer to a bill of discovery. [See Greenleaf on Evidence, 604, § 569, and the authorities there cited; and the case of Bennett v. Robinson's adm'r, 3 S. & P. 227.] It is true this rule has some exceptions, but the facts of this case do not bring it within any one of them. And, if the *obligor* can make the objection, because a fact may be known to the witness, which may not be known to him; and because he has a right to avail himself of all the knowledge of the subscribing witness relative to the transaction; how much more forcibly do the reasons apply in favor of one who is not a party to

the instrument, has no knowledge of it, and has made no admissions concerning it? In the case of Falls & Caldwell v. Gaither, [9 Porter, 605,] this court seems to have relaxed the rule, so far as to admit the testimony of an agent, by whom a written contract was executed—although the subscribing witness might have been within the reach of the process of the court. It seems to me, that this was establishing a new exception to the general rule; and, as an agent may be presumed free from the interest, which must attach in the case of the parties to the contract, I am not now disposed to disturb the point. But, I cannot agree, where a paper is introduced collaterally, to affect the interest of one who is not a party to it, to dispense with the knowledge of all the circumstances attending its execution, which the subscribing witness may be supposed to possess. I, therefore, conclude, the court erred in admitting the mortgage as evidence, under the circumstances set forth in the bill of exceptions.

2. The next question arising on the bill of exceptions is, whether the court erred in charging the jury upon the facts as stated? The charge was, that if the jury believed, from the evidence, that Preston was the agent of the plaintiffs, to secure the notes due them by Marshall; and took the note sued on, with the defendant as security, at the time, having a mortgage on the effects of Marshall to secure himself personally, and did not inform the defendant of the existence of that mortgage; and that defendant at the time he signed the note for Marshall was not in any manner notified of said mortgage; that, then, it was a *concealment*, which amounted to a fraud on the defendant, and they must find in his favor.

The broad principle assumed in this charge is, in a few words, that when a man is taking a note, or obligation with security, and happens to know circumstances unfavorable to the credit, solvency, or responsibility of the principal, which are unknown to the person becoming security, and does not communicate, or make them known to him, that the omission to make them known is a fraud; which vitiates and destroys the binding efficacy of the contract. This would be carrying the doctrine very far, and before it is adopted as the law of the land, ought to be well understood in its practical results, as well as sustained by authority. Is such a principle recognized, or acted upon, generally, by men of the most scrupulous honor and honesty? Why does one man

usually require security of another? It is because he has not sufficient confidence in, or knowledge of, the solvency, or ability of the one, who is to undertake the payment of the debt, or performance of the duty. It would seem that the very requirement of security, implied this want of confidence, or knowledge—and that it would admonish one, not better acquainted with the circumstances of the principal, to be upon his guard—and it is no doubt often the case, that the security agrees to be bound, because he knows the situation of his principal better than the obligee or payee. It is not assumed as a fact, on which the charge is founded, that either the plaintiffs, or Preston, as their agent, represented the property of Marshall, the principal, to be free from incumbrance; nor that it was through the agency of Preston, the defendant bound himself as security; on the contrary, in a foregoing part of the bill of exceptions, it is stated that "Marshall obtained the signature of the defendant to the note, on which said defendant has been sued by plaintiffs, and that Preston also knew that said defendant was about to sign said note for Marshall, and did permit said defendant to sign it, without letting him know that the goods then in possession of said Marshall had, previously by said Marshall, been mortgaged to said Preston." This is the state of facts, to which the charge of the court must be understood as having reference. It is, in effect, merely that Marshall, the principal himself, obtained the defendant's signature as security; and that Preston *permitted* him to sign the note, without telling him, that he (Preston) had a mortgage on the goods of the principal. On what principal of law was Preston bound to interpose and make known such a fact? We cannot believe such an one can be found, or that Preston was under even a moral obligation, so to interfer.

But, the question is, would such concealment, as that disclosed by the evidence amount to a fraud, in legal contemplation. It is true, fraud, in its general acceptation may be defined the *misrepresentation* or *concealment* of a material fact. But, "it is extremely difficult to advance any general principle, or elementary doctrine on this subject. Cases of fraud depend peculiarly on the particular facts which have occurred, the relative situation of the parties, and their means of information." [See Chitty on Con. 3d Am. ed. 223.) It may be laid down, that to constitute fraud, there must be a misrepresentation, or concealment of a

fact, peculiarly within the knowledge of the party, who does either—or some device must be used, naturally calculated to lull the suspicions of a careful man, and induce him to forego enquiry into a matter upon which the other party has information, although such information be not exclusively within his reach. [Id. 223, 4.]

The concealment, or non-disclosure of facts, which amount to a fraud, must be "of those facts and circumstances, which one party is under some legal, or moral obligation to communicate to the other; and which the latter has a right, not merely in *foro conscientiae*, but *juris et dejure*, to know." [1 Story's Com. on Eq. P. 216, § 207.] In treating further on the subject, the same learned author, remarks, "for many most material facts may be unknown to one party, and known to the other, and *not equally accessible*, or, at the moment, within the reach of both; and yet contracts, founded on such ignorance on one side, and knowledge on the other, may be completely obligatory. Thus, if one party has actual knowledge of an event or fact, from private sources, not then known to the other party, from whom he purchases goods, and which knowledge would materially enhance the price of the goods, or change the intention of the party, as to the sale; the contract of sale of the goods will nevertheless be valid." [Id. 217, 218.]

In the case of Laidlaw v. Organ, [2 Wheat. 195,] where this question substantially came up, Chief Justice Marshall, in delivering the opinion of the court, said: "The question in this case is, whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and *which was exclusively within the knowledge of the vendee*, ought to have been communicated by him to the vendor? The court is of opinion, that he was not bound to communicate it. It would be difficult to circumscribe the doctrine within proper limits, when the means of intelligence are equally accessible to both parties. But, at the same time, each party must take care not to say, or do any thing tending to impose on the other."

It may be further remarked, that to constitute a fraud, an omission to communicate, or a concealment of facts in such cases, should at least be attended by evidence of some trust, or confidence, reposed by one party in the other. The contrary doctrine, to that here laid down, would be extremely inconvenient, and would open an interminable field of litigation. In a large portion

of the contracts made between man and man, one of the parties may be possessed of more information than the other, or that which may be exclusively within his knowledge—though accessible to the other, if proper vigilance be exercised. To authorise an action for damages, or a bill in chancery to rescind, every such contract, would lead to endless litigation.

These views result in the conclusion, that the charge of the court below to the jury, was erroneous.

3. The application of the principles laid down to the second and fifth pleas, relied on by the defendant, will shew that they were both defective. Neither of them sets forth such facts, as amount to fraud. Consequently, the court erred in overruling the demurrers to those pleas.

4. But the third plea sets forth, in substance, that the plaintiffs knew the property of said Marshall to be encumbered, and fraudulently represented to the defendant, that Marshall was to have the privilege of discharging the note sued upon, by the proceeds of the property then in his possession; and that the plaintiffs did not give said Marshall the privilege of so discharging said note; but that their agent has appropriated said property, then in said Marshall's possession, to the payment of other debts, and that said Marshall is now insolvent. Here is an allegation of a misrepresentation, knowingly made by the plaintiffs to the defendant, calculated to mislead and deceive the latter; a misrepresentation "calculated to lull the suspicions of a careful man, and induce him to forego enquiry into the matter," and constitutes a legal fraud. We, therefore, conclude, the court below did not err in overruling the demurrer to the third plea.

But, for the errors arising upon the bill of exceptions, and in overruling the demurrers to the second and fifth pleas; let the judgment be reversed, and the cause remanded.

COLLIER, C. J.—I differed with my brothers in Falls and Caldwell v. Gaither, in what I considered a departure from the ancient and strict rule, which requires proof by the attesting witness, of the execution of the deed, where his evidence is attainable. That case determines that an agent is competent to prove that a writing was executed by him, under authority from, and on behalf of his principal. Why the evidence of the agent should be admissible, and the principal incompetent in a case in which

the latter has no interest, I am unable to perceive. I am perfectly willing to regard the case cited, as authoritative, and if in the present case, the mortgagor testified to the execution of the mortgage, or admitted its legal existence, we cannot in my judgment, in the absence of all interest disregard his evidence. Such proof comes within the principle we have recognized. I have merely added these few remarks, to call attention to the fact, that what my brother CLAY, has said on this point, is not intended to conclude us if the question should hereafter arise.

DUNCAN v. JETER.

1. Upon a sale of land, the vendor received from the vendees part of the purchase money in hand, and for the residue took their notes payable in two instalments of about one and two years, and executed to them his bond to make title to the land so soon as he obtained the patent from the United States. The patent did not arrive until after the last note fell due: *Held*, that the vendees could not demand title without paying, or offering to pay the purchase money.
2. If a vendee of land wishes to rescind the contract of sale, he must pay, or offer to pay the purchase money, according to his contract, and if the vendor refuses to make the title, the vendee may rescind the contract by returning, or offering to return the possession, and must abandon the possession, unless some circumstance, such as the insolvency of the vendor, or other sufficient cause authorises the retention of possession for his indemnity.

ERROR to the Chancery Court sitting for Russell county.

This bill, which was filed by the plaintiff in error, charges, that in January, 1839, the complainant and one Swan, purchased of the defendant in error, a tract of land, at the price of thirty-two hundred dollars, paying down at the time of purchase, one thousand dollars, and executing their notes, one for one thousand dollars, payable on the 25th December, 1839, and the other for twelve hundred dollars, payable on the 25th December, 1840.

That the defendant executed at the time to complainant and Swan, a bond, in the penalty of six thousand four hundred dol-

lars, with condition to make them a title to said land, with warranty, when the patent therefor arrived from Washington. That after the maturity of the first note they made a payment thereon, took it up and executed a new note for the residue, six hundred and twenty-five dollars; that in the year 1842, after the last note fell due, defendant commenced suit thereon against the complainant and Swan; that afterwards the patent for the land arrived from Washington, and complainant and Swan, demanded from defendant the title thereto, presenting to him a deed for the land, which he refused to execute; that thereupon they considered the contract as at an end, and in the spring of 1842, brought an action on the bond for damages for failing to make title according to its terms. That thereupon the defendant filed a bill in chancery, against complainant and Swan, praying an injunction against the prosecution of their suit on the bond; which injunction was granted. That Swan has departed this life; that Jeter is insolvent, or so nearly so, that he would be unable to respond in damages for the breach of his bond.

The prayer of the bill is for a recision of the contract, and return of the money paid, and for an injunction, which was granted by the register.

The defendant, by his answer, admits the sale of the land as stated in the bill; he admits that title was demanded after the purchase money had become due, and suits instituted on the notes; and avers that he offered to make the title, on the payment of the purchase money, and that he is still ready and willing to do so. He denies that he is unable to respond in damages, and demurs to the bill.

A motion being made to dismiss the bill, and also to dissolve the injunction, the chancellor dismissed the bill, which is now assigned for error.

Belser, for plaintiff in error, cited 5 S. and P. 450; 4 Porter, 528; 1 Ala. Rep. 502; 2 ib. 108, 632; 3 ib. 42; 1 Hen. & Mun. 130.

Heydenfeldt, *contra.*

ORMOND, J.—The contract for the sale of the land by the defendant in this court, to the plaintiff, and another, is exceeding-

ly simple, and the respective obligations and rights growing out of it, so easy to be understood, that it is wonderful it should have been made the source of so much litigation.

By the contract of sale, a portion of the purchase money was paid down, and a credit of about one and two years given on the residue, the vendor executing a penal bond with condition, to make title to the land as soon as he received it from the U. States.

As the time when the vendor could be called on for title, was uncertain, depending on his getting it from the government, whilst the time for the payment of the purchase money, was ascertained, the stipulations were independent. The vendor had a right to maintain an action for the purchase money, without averring that he had made, or offered to make a title to the land sold, and on the other hand, the vendees could demand title before the payments fell due, if before that time the vendor by the receipt of the patent from the government, had been in a condition to make title. [Pordage v. Cole, 1 Saunders Rep. 320, note 4, and cases there cited.]

The title, however, was not received from the government by the vendor until after the last instalment for the purchase money fell due. After this, the vendees demanded the title which the vendor offered to make, on the payment of the purchase money, which they refused to pay, and he thereupon declined making the title.

This refusal, by the vendor, was entirely justifiable, as will be seen by enquiring what was necessary to be done by the vendees to entitle themselves to a rescision of the contract. A rescision of a contract does not follow as a consequence of its non-performance, by either party. [Stone v. Gover, 1 Ala. Rep. 289.] If the vendor improperly refuses to make title on demand the vendee may bring an action on the bond and recover for the breach of the contract, such damages as he has actually sustained by the failure of the vendor to comply with his contract; but it is obvious that such an action does not necessarily suppose the contract to be at an end. If the vendee wishes by a rescision to put an end to the contract he must himself be active and perform, or at least offer to perform the contract on his part. He must, in such a case as the present offer to pay the purchase money, and in addition;

must put the vendor in *statu quo*, by abandoning to him the possession of the land. [Clemens v. Loggins, 1 Ala. Rep. 622.]

It is true, that in reference to the abandonment of possession, circumstances may exist which would authorize the vendee to retain it. As where the vendor was insolvent and unable or unwilling to make the title; in such a case, the possession might be retained as the only means of reimbursement for money paid on account of the purchase. Such was the case of Young v. Harris, [2 Ala. Rep. 108,] where relief was granted, under circumstances of that description, without abandonment of the possession by the vendor.

In this case, the vendees refused to pay the purchase money, although by their contract, it was due; retained the possession of the land, and now affect to consider the contract as at an end, although the vendor has always been willing to perform the contract on his part; such a pretension cannot be tolerated.

The case of Haynes v. Farley, [4th Porter, 528,] relied on by the plaintiff's counsel determines no point adverse to the view here taken. In that case, there was a breach by the vendor, of the condition of the bond for title, by his failing to make title according to its terms, and this court held, that after an action was commenced at law by the vendee to recover damages for its breach, a court of equity would not interfere at the instance of the vendor, who showed no excuse for the failure to comply with his contract, anterior to the breach. Here, there was no breach of the condition of the bond, but on the contrary, the vendor was always willing to comply with its terms, upon the performance by the vendees, of the contract on their part.

Our conclusion is, that there is no equity in the bill.

Let the decree of the chancellor be affirmed.

WILKERSON AND ANOTHER, v. BRANHAM.

1. The court may, after judgment for the plaintiff, permit a declaration to be substituted in lieu of the original, when it has been lost or mislaid; and though it is proper to require notice to be given to the defendant, that a motion will be made for that purpose, yet if the court grant the motion, without a previous notice, its action will not be considered as void or irregular.

WRIT of Error to the Circuit Court of Russell.

This was an action of *assumpsit*, by the defendant in error, against the plaintiffs, on a promissory note, for the payment of twelve hundred and sixty-seven 31-100 dollars, on the twenty-fifth day of December, eighteen hundred and forty, with interest from the first of January, preceding, "if not punctually paid." On the note two credits are indorsed, one for eighty dollars, on the 24th January, 1842; the other for fifty dollars, on the 20th of March, thereafter; and on the 17th October of the same year, the plaintiff recovered a judgment by default, for thirteen hundred and ten 82-100 dollars, besides costs.

At the term of the circuit court, next succeeding the rendition of the judgment, the plaintiff moved for leave to substitute a declaration in lieu of the original, which had been lost or mislaid; this motion was granted, and the declaration filed, but whether notice of the motion was given to the defendants does not appear.

HEYDENFELDT, for the plaintiffs in error, made two points. 1. Interest was calculated from the first of January, 1840, when it was recoverable only from the maturity of the note. [Minor's Rep. 126, 170, 209; Newland on Con. 311.]

2. The substitution of a declaration should not have been permitted without notice having been given to the defendants below. [Dozier v. Joyce, 8 Porter's Rep. 303.]

BELSER, for the defendant. The first point is not tenable: interest was only calculated from the time the note became due. The substitution of a declaration was entirely proper, even with-

out a notice; but if a notice was necessary, it will not be intended that it was not given. [3 Johns. Rep. 143; Id. 433; 5 Id. 163; 1 Johns. Cases, 31; 3 Cow. Rep. 39; 18 Wend. Rep. 675; 8 Porter's Rep. 310; 9 Id. 593.]

COLLIER, C. J.—The first objection taken to the judgment is not sustained by the record. A calculation of interest after allowing the credits indorsed, shows that the judgment is for a sum less than was due on the note, computing from the time of its maturity.

Dozier v. Joice, [8 Porter's Rep. 303, and Williams, et al. v. Powell, 9 Porter, 493,] show, that it is competent for the court to permit a declaration to be substituted for the original, when it has been lost or mislaid. In the first case, leave was given pending the trial, to supply the writ and declaration, which were then discovered to have been lost; in the last, the substitution was made after judgment: in the first, the parties were before the court, and of course had notice, and in the last, it is expressly stated in the record, that the defendants had notice of the motion. In neither case does the court explicitly decide, that notice was indispensable to authorise its action; but in Williams, et al, v. Powell, after speaking of the embarrassment which would some times be felt, in determining upon an application to substitute papers, if affidavits and counter affidavits were received, we say, "to avoid this perplexity, the court should in the first place propose to the parties, to permit such a paper to be filed as they may agree on—if they will not, or cannot agree, then the court should have recourse to such proof as may satisfy it that the paper offered, corresponded so nearly with the paper lost, that the adverse party could not be prejudiced; but in no case should a substitute be allowed where this proof cannot be made."

As a precautionary measure, to prevent injustice from being done, we are prepared to say, that where the motion is made after judgment, notice should be given, yet it must be regarded as a mere question of practice, and we are inclined to think, if the court act without it, its judgment would not be reversible. In the case of the lessee of Walden v. Craig's heirs, et al. [14 Peters' Rep. 154,] the court say, that the general rule, which declares a notice to be necessary to enable a court to exercise jurisdiction, applies only where original jurisdiction is exercised, and not to

the decision of a collateral question, in a case where the parties are before the court. In that case, a motion had been made after judgment to extend the demise in an action of ejectment. It was said, "if it were necessary, notice in the case under consideration might well be presumed. For it does not follow, that no notice was given, because none appears upon the record. The fact of notice may be proved by parol." Again, "after judgment the parties are still in court, for all the purposes of giving effect to it. And in the action of ejectment, the court having power to extend the demise after judgment, the defendant may be considered in court on this motion to amend, as well as on any other motion or order, which may be necessary to carry into effect the judgment. In no correct sense is the exercise of this power of amendment similar to the exercise of an original jurisdiction, between parties on whom process has not been served."

This reasoning seems to us to be so just, and the conclusion to which it leads likely to produce so little injury, that we can have no hesitation in adopting it in the present case. Our conclusion is, that the judgment of the circuit court be affirmed.

KING & BARNES, ADM'RS, v. MOSELY.

1. "A covenant in a bond for title to land, that H. W. B, and M. B, his wife, shall well and truly convey, and make a fee simple title to the land to the said M," upon the payment of the purchase money—only bound the wife to relinquish her dower, and did not bind her individually to make title to the lands; nor was the surety to the bond bound for her acts, further than she was bound herself.
2. The statute of *non-claim*, commences runing from the time of the payment of the purchase money of land, if there is any one then in being of whom the vendee can demand title, and the rule would be the same, if the vendee was evicted by title paramount, or the hier asserted a title hostile to that of his ancestor.

ERROR to the Circuit Court of Dallas.

John Mosely, defendant in error, brought an action, in the cir-

cuit court of Dallas, against the plaintiffs in error, as administrators of Lloyd Barns, deceased, upon a bond, dated 4th December, 1832, executed by Henry W. Barnes, with Martha M. Barnes, his wife, and the said Lloyd Barnes, deceased, for the payment of twenty-eight hundred dollars, to said Mosely, with a condition under written; whereby, after reciting to the effect, that said Mosely, together with Mary and Clement Mosely, had that day executed three promissory notes to the said Henry W. Barnes, one payable on the 1st of January, 1834, for $400; one payable on the 1st January, 1835, for $500, and one payable on the 1st January, 1836, for $500; and said condition further recited, that said notes had been given by said John Mosely, as the purchase money for two several tracts of land, lying and being in Edgefield District, South Carolina, (the metes and bounds of which are described,) and that the title was to be made to said lands when the said notes were paid; then if the said Henry W. Barnes and Martha Barns, his wife should well and truly convey, and make a fee simple title to the said land, to the said Mosely, and warrant and defend the same against all persons, especially against the said Martha and her heirs that then the obligation was to be void, otherwise to remain in full force and virtue.

The declaration sets out this condition, and avers, that "although said Mosely had long since paid all said promissory notes, given for said purchase money, for said land, and every part thereof to said Henry W. Barnes, yet neither the said Henry W. Barnes, nor the said Martha Barnes, his wife have made a fee simple title to said lands, to Mosely, and warranted and defended the same against all persons, especially the said Martha Barnes and her heirs; but so do, after the death of the said Henry W., the said Martha had hitherto wholly neglected and refused, and still does neglect and refuse, although specially requested so to do, heretofore, to wit: on the 25th September, 1841, after the death of said Henry W. Barnes, to wit, in the county aforesaid, by reason of which breaches, the said writing obligatory became forfeited, and an action accrued to demand and have said sum of $2800.

To this declaration, there was a general demurrer in short, by consent; which was overruled by the court.

The defendants (in the court below) then filed seven pleas;

which, with the proceedings consequent upon them, it is deemed unnecessary to notice on this occasion, except the last.

The 7th plea was upon the statute of *non-claim;* setting forth that the claim or demand, sued on, was not presented to the defendants, as administrators, within eighteen months after the letters of administration on the estate of their intestate were granted, nor within eighteen months after said claim accrued—and which letters were granted on the 8th of October, 1838.

To this plea the plaintiffs demurred, which having been overruled by the court, he filed a replication to said plea, that his aforesaid claim or demand accrued within eighteen months next previous to the commencement of this action, and not sooner, to wit, on the 25th September, 1841, at, to wit, in the county aforesaid, and this he is ready to verify, &c.

To this replication, the defendants in the court below, demurred; but the court overruled the demurrer.

The judgment of the court below overruling the demurrer to the declaration, and that overruling the demurrer to the replication to the 7th plea, are the only assignments of error, which the court think it necessary to notice.

R. Saffold and G. W. Gayle, for plaintiffs in error.
Wm. Hunter, *contra.*

CLAY, J—1. The question, whether the court below erred, in overruling the demurrer to the declaration, rests upon the legal effect of the bond, on which the action is founded. The bond was given by Henry W. Barnes, with Martha M. Barnes, his wife, and Lloyd Barns, the intestate of the plaintiffs in error, to the defendant in error, in the penal sum of $2800, conditioned for the conveyance by the said Henry W, and Martha M, of title to certain lands in South Carolina, on the payment of a certain sum, being the consideration for said lands, by the said John Mosely. The declaration avers the payment of the purchase money, long since, and the tender of a deed of conveyance to Martha M. Barnes, for her signature, on a day previous to the commencement of the action.

It is admitted by the counsel, on both sides, and such is undoubtedly the law of this country, that this bond imposed no legal obligation on Martha M, Barnes. Being a married woman at the

date of its execution, as appears upon the face of the bond, she was incapable of binding herself, and so far as it purports to impose any duty on her, it is absolutely void. It is a settled principle of the common law, that *coveture* disqualifies a *feme* from entering into a contract, or covenant, personally binding upon her. She may, at common law, pass her real property by a *fine* levied; and under our statute, and similar ones, perhaps exist in most, or all the other states, she may, in conjunction with her husband, and upon such examination as the statute requires, convey her real estate or any existing, or future contingent interest in it. This has been well called a shield of protection, which the law throws around a married woman, in reference to the possibility, that the husband, practising upon her affections and fears, may take undue advantage of her. Hence, she is disabled from contracting personally, with him relative to her property, except according to the forms prescribed by law. [17 John. R. 167; Clancey's husband and wife, 68; 32 vol. Law Library, 59.]

But, the counsel for the defendant in error, admitting the soundness of this principle, contends that a man may covenant for the performance of the acts or duties of another; and, that regarding this bond, as not in any degree legally binding on Martha M. Barnes, his wife, it must be construed as the obligation or covenant of Henry W. Barnes, that Martha M. Barnes, should make the conveyance of title contemplated by the condition. It is not controverted that an individual may covenant that another, shall do an act, or perform a duty; but the question recurs, is this a covenant of that nature? The stipulation in the condition of the bond, is not that Martha M. Barnes shall convey title to the lands described, after the death of her husband; nor that she, individually, shall, at any time, make the conveyance, but that "the said Henry W. Barnes, and Martha M. Barnes, *his wife*, shall well and truly convey, and make fee simple title" &c. In placing a construction on a contract, or ascertaining the meaning of the parties, reference should always be had to the laws of the country, in which it is made, and the surrounding circumstances; and language should be interpreted according to its usual acceptation. According to the law of this State, when the contract was made, a *feme covert* must unite with her husband in the conveyance of real estate, of which he is seized and possessed during the coverture, in order to bar her claim to dower, if she should survive

him. For that purpose alone, she joins him in the deed, and if she were afterwards to become entitled to the land, through any other medium, she would not be *estopped* to assert her right, in consequence of having signed the deed with her husband. It would not be assuming too much, to suppose, that it is the general understanding of the country, that a married woman should unite with her husband in a conveyance of real estate, for the purpose of securing the purchaser against her future, contingent claim for dower. Then, it is reasonable to suppose, that when this bond was executed, the parties had these things in their minds, and with the view to the relinquishment of her dower, merely, and not the conveyance of the title, she was united with her husband in the bond. There is no covenant in it, that she shall ever make a separate conveyance; and, as it would have been a futile attempt to bind her by such a contract, the reasonable construction, appears to be, that the understanding of the parties was, that she should join her husband in making such a conveyance, as would conform to the law and practice of the country.

It is admitted on all hands, as the settled law of this State, that an individual holding an obligation for the conveyance of title to real property, is bound to tender to the obligor, a deed conforming to its terms, before he can allege a breach. We have seen that the signature of Martha M. Barnes to the bond, on which this action is founded, imposed on her no legal obligation to make the conveyance; and we have seen that the bond cannot be construed as a covenant, on the part of Henry W. Barnes, or Lloyd Barns, that a title should be conveyed by Martha M. Barnes, separately and individually. From these premises, the conclusion is inevitable, that the tender of the deed to Martha M. Barnes, was not such as to sustain any breach of the condition; the breach assigned in the declaration is defective, and the demurrer should have been sustained.

The right to demand such a conveyance, as is contemplated by the condition of the bond, accrued on the complete payment of the purchase money. If Henry W. Barnes was then living, there is no doubt, that the tender of a proper deed to him, would have been good; and his neglect, or refusal to execute it, would have been a breach of his covenant. If he was then dead, the tender

of the deed might have been made to his heirs, if they were of full age, and the lands had descended to them.

2. The views, which have been presented on the first assignment of errors would dispose of the case in this court, for the present, but we have thought it advisable to pass on the 7th assignment, which goes to the overruling the defendant's demurrer to the plaintiff's replication, to the plea of the statute of *non-claim*, as it may have an important influence on the future destiny of the cause, between these parties.

As we have seen, the plea alleges, that the claim, or demand, sued on, was not presented to the defendants (as administrators of Lloyd Barnes) within eighteen months after the letters of administration on the estate of said Lloyd Barnes, deceased, were granted, nor within eighteen months after said claim accrued—and that said letters were granted on the 8th of October, 1838. The replication avers that the claim or demand accrued within eighteen months previous to the commencement of this action, and not sooner, to wit, on the 25th September, 1841, and concludes with a verification. Here is merely a re-affirmance of the averment in the declaration, so far as regards *the time of tendering the deed* to Martha M. Barnes; without any additional averment or fact, as to the manner, or means, by which the claim accrued. The averment is insufficient of itself, because it does not show why, or how, it so accrued; and there is no averment that supplies this deficiency, but it is left to the terms of the condition of the bond, which fixes the time for making the deed, or the right of the obligee to demand it, at the time of the payment of the purchase money. The day on which the payment was made, is no where shewn by the foregoing part of the pleadings, and as the replication leaves it uncertain, it must be considered defective.

We do not consider the argument sound, that the statute of non-claim only began to run from the tender of the deed, if it had been made to a person under any legal obligation to convey; nor that it would only begin to run *when the right of action accrued.* The provision of the statute is, that "all claims against the estates of deceased persons shall be presented to the executor or administrator, within eighteen months after the same shall have accrued, or within eighteen months after letters testamentary, or letters of administration shall have been granted to the executor,

or administrator," &c. The language of the statute is not *after the right of action has accrued*, but *after the claim has accrued.* It certainly never has been its construction, that a claim which does not become due within eighteen months, after the grant of letters testamentary, or of administration, shall not be presented within that time. Such a construction would go far to defeat the beneficial purposes for which it was intended; and, as we think, would be inconsistent with the interpretation heretofore given it by the courts.

The *claim* in this case, was primarily for a conveyance of the land, for the performance of which, the personal representatives were not responsible until it was converted into a money demand by a breach of the condition of the bond. It could not, however, be tolerated that the obligee should lie by for years, without demanding performance, and then convert his claim into a money demand, and proceed against the executor.

We think, therefore, that the statute would commence running from the time of the payment of the purchase money, if there was any one then in being, of whom the obligee could demand title. The same rule would obtain, if the obligee was evicted by title paramount, or the heir asserted a title to the land hostile to the title of his ancestor; as in both cases a demand of title would be nugatory; and the law never requires an unnecessary act to be done. The case of Paine v. Smith, ex'r, [2 Root's Rep. 142,] establishes the principle, that there is no difference between a conditional and absolute liability, as to the necessity of a presentment to the executor, to prevent the operation of the statute of *non-claim.*

Whether, in a case where the obligor died previous to the right of the obligee to demand title, and the title descended to infant heirs, it would not be necessary, if the obligee wished to preserve his claim against the executor, that he should proceed promptly against the heirs, in a court of chancery, or by petition to the county court, under our statute, need not now be determined.

Let the judgment be reversed, and the cause remanded.

ELMES & Co. v. McKENZIE.

1. In pleas in abatement, matters of form are regarded as substance; therefore where a plea to the jurisdiction, that the defendant was a resident free-holder of another county, contained a verification, and concluded to the country, it was held bad on demurrer.
2. The statute abolishing special demurrers, does not apply to pleas in abatement.

ERROR to the County Court of Autauga.

Assumpsit, by the plaintiffs in error, against the defendant in error, who in proper person pleaded in abatement, "that at the time the plaintiff's writ was executed upon him, that he was a citizen and free-holder of the county of Tallapoosa, and that he still resides in said county, and ever has, from the begining of the said action; all of which he is ready to verify and therefore he puts himself upon the country, whether the plaintiff should have or maintain the said action. Sworn to, &c.

JOHN McKENZIE."

To this plea, the plaintiffs demurred and the court overruled the demurrer, and thereupon the plaintiffs took issue on the plea, and verdict and judgment for the defendants.

The plaintiffs assign for error, the judgment on the demurrer.

PRYOR, for the plaintiff in error, cited 7th Porter, 445.

ORMOND, J.—The plea is defective in concluding to the country. Pleas to the jurisdiction should conclude with a verification. [1 Chitty's Pleading, 450.] It is true, that in the body of the plea, there is an offer to verify it, but the conclusion of the plea is to the country, which must be regarded as the tender of an issue to the country, as it could not be tolerated that a plea in abatement, should be framed so ambiguously as to leave it in doubt, whether it concluded with a verification or to the country. Matters of form are regarded as substance in pleas in abatement, and are not embraced in our statute abolishing special demurrers. [7 Porter, 445.] So, in England, the statute in relation to the assignment of causes of demurrer, has been held, not to apply to pleas in abatement. [2 M. and S. 484.]

Let the judgment be reversed, and the cause remanded.

LUNSFORD, ET AL. v. RICHARDSON & ONEAL.

1. The act to authorise the amendments of writs of error, requires the writ to be amended in all cases, where it is necessary to make it conform to the record.
2. A writ of error will lie, to revise the judgment of a court overruling a motion to quash a forthcoming bond, so as to avoid an execution issued thereon; and although the execution has not been made part of the record by bill of exceptions, or otherwise, it will be looked to by the appellate court, to ascertain if it is correctly described in the condition of the bond.
3. The forthcoming bond described a *fieri facias* as having issued against the goods &c. of J L, requiring to be made for debt, damages and costs $2743; the *fi. fa.* issued against the goods, &c. of J L, W H C, L J M, and A J S, requiring to be made the sum of $2492 50-100: *Held*, that the bond did not conform to the execution, and that the same should be quashed.

WRIT of Error to the Circuit Court of Sumter.

This was a motion by the plaintiffs in error, to quash a forthcoming bond. The bond is dated the 26th March, 1840; is executed by John Lunsford, Peter B. Whiting, and James E. Jones, in favor of the defendants, and is in the penal sum of five thousand four hundred and eighty-six dollars. In the condition it is recited that an execution issued from the Circuit court of Sumter, in favor of the defendants in error against "John Lunsford for the sum of two thousand seven hundred and forty-three dollars, including debt, damages and costs; bearing test the 16th day of March, 1840, which execution was levied on one hundred bales of cotton as the property of Lunsford, to satisfy the same. The condition proceeded as usual to declare, that the bond should be void if the cotton was delivered at the time and place of sale, both of which were particularly designated.

The execution, including debt, damages, and the costs taxed by the clerk, required to be made the sum of twenty-four hundred and ninety-two 50-100 dollars; and on the ground of the discrepancy between the execution really issued and that described in the condition of the bond, the motion to quash was founded. The judgment of the court on the motion is as follows: "Richardson & Oneal v. John Lunsford. This day came the parties, by their attorney, and the motion to quash the forthcoming bond, &c.

coming on to be heard, and after argument of counsel had thereon, it is considered by the court that said motion be discharged."

The parties to the writ of error are John Lunsford, Peter B. Whiting and Richard S. Jones, adm'rs of James E. Jones, dec. plaintiffs, and Richardson & Oneal, the defendants.

R. H. Smith, for the plaintiffs in error. Anticipating the argument for the defendant in error, he insisted that the judgment on the motion to quash may be reviewed on error; the cases decided by this court are not opposed to such a conclusion; that if there is a misjoinder of plaintiffs in error, the writ may either be amended, or considered as amended under the late statute upon the subject. The description of the parties to the judgment in the margin of the entry may be rejected as surplusage, and the judgment be held to decide the motion as between all the parties to the execution and forthcoming bond. [Drummond v. Wright, 1 Ala. Rep. 205.] The execution is a part of the record, and may be referred to for the purpose of ascertaining whether it authorized such a bond as was executed. [1 Munf. Rep. 60; 2 Leigh's Rep. 545.] In a proceeding such as this was, no notice was necessary—it was an incidental step in the case which the parties are presumed to have been informed of, in consequence of their continuance in court.

These objections being out of the way, the discrepancy between the bond and execution will be apparent. The penalty of the bond is $5,486, and the execution described is for $2,743, including debt, damages and costs. The *fieri facias* which was levied is for $2,492 50-100, including debt, damages and costs, and double the amount is $4,985. This is regarded as sufficient to authorize a reversal. [Aik. Dig. 171; 2 Porter, 494; 3 Ala. R. 484; 1 Ala. Rep. N. S. 316; 7 Mass. Rep. 98; 1 Mumf. Rep. 605; 2 Leigh's Rep. 545.]

Metcalfe, for the defendants in error. The writ of error should be dismissed, because there is no such judgment as can be revised by an appellate court; the judgment described in the writ of error is not such as is found in the record; and besides, there is a misjoinder of plaintiffs, which cannot be amended. [Smith & Hill v. Cobb, 1 Stewt. Rep. 62.] But if the writ of error be sustained, it is insisted, that the bond and execution cannot be

looked to, not being set out by bill of exceptions. [4 Porter's R. 332; 7 Id. 156–270; 9 Id. 136–312; 1 Ala. Rep. N. S. 425; 2 Id. 345; 3 Id. 285.]

Again, the motion was rightly overruled, because it did not appear that the defendant in error had notice of it. [1 Stewt. & P. Rep. 158; 1 Ala. Rep. N. S. 207; 3 Id. 289.] The appearance by attorney, when no issue was made or trial had, does not cure the want of notice. [1 Porter's Rep. 285; 8 Id. 99; 3 Al. Rep. 289.]

COLLIER, C. J.—By act of the Legislature "To authorise the amendments of writs of error," it is enacted "that all writs of error wherein there shall be any variance from the original record, either in the name or the number of the parties, the form of action, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts, where such writ or writs of error shall be made returnable, under such rules and regulations as the Supreme court may prescribe." [Clay's Dig. 312, § 39.] The provisions of this statute are so general as to require a writ of error to be amended in all cases where it is necessary to make it conform to the record which accompanies it. We cannot then repudiate this cause because there are too many parties to the writ of error, or because the plaintiffs are liable in different rights, but should rather make the proper amendment.

In regard to the objection that the writ of error does not correctly describe the judgment in the record, it may be again remarked, that if necessary an amendment could be made, so that the former would harmonize with the latter. But we are inclined to think that as the entry made upon the determination of the motion is in proper form, the statement of the parties names upon the margin, if important, is amendable under the act of 1824, entitled "An act to regulate pleadings at common law." [Aik. Dig. 266; Armstrong v. Robertson & Barnwell, 2 Ala. Rep. N. S. 164; Drummond v. Wright, 1 Ala. Rep. N. S. 205.]

The decision of a court upon a motion addressed to its discretion, cannot be reviewed by an appellate court; hence the motion to strike out a plea, if refused, furnishes no sufficient ground of error, for it is competent for the court to put the plaintiff to his demurrer. [Johnson, adm'r, v. Wren, 3 Stewart's Rep. 172;

Townson v. Moore, 9 Porter's Rep. 136.] So, where the overruling a motion to quash may not be ultimately prejudicial to the party making it, but he may have the benefit of his objection in some other form, a writ of error founded upon such a decision should not perhaps be entertained. But where a decision is definitive, and the same point cannot be made in another form, we know of no rule which inhibits the revision on error of such a judgment. In Hester, et al. v. Keith & Kelly, [1 Ala. Rep. N. S. 316,] a supersedeas was granted by the judge of the county court of Tuskaloosa, to arrest proceedings on an execution, but was afterwards dismissed; a writ of error was sued to this court, and no objection was made to its maintenance in such a case, though the writ was dismissed for a misjoinder of parties.—A supersedeas is a remedy resorted to in vacation, to suspend the action of an execution until court, with the view that it may then be quashed; in term time it is unnecessary, as the powers of the court on a motion to quash, are ample, to effect every thing it proposes, and when a *supersedeas* is dismissed upon the ground, that an execution is unobjectionable, the decision is nothing more than the refusal to quash it. So, that if a case like the one cited, could be here entertained, the one at bar may also be reviewed. In conformity to this view, has been the practice of this court, ever since its organization.

The course always pursued in this State for the purpose of avoiding forthcoming bonds, or destroying the effect of executions issued thereon, is by a motion such as was adopted in the present case. And it is impliedly recognized as correct by the act of 1807, which among other things, provides "If any forthcoming bond be quashed as faulty, the sheriff taking the same shall be at all times liable for damages to the party injured."—[Aik. Dig. 171.] If such a proceeding be not allowable, the obligor of the bond would be without remedy, for though the law authorises an execution to issue on the bond, yet it is not regarded as a judgment upon which a writ of error will lie. [Taylor, et al. v. Powers, use, &c. 3 Ala. Rep. 285.]

The counsel for the defendant in error does not deny the power of the court to which a forthcoming bond is returned, to quash, either the bond or an execution issued thereon, but he insists that as the execution upon the levy of which the bond was given, is not made a part of the record by bill of exceptions, or otherwise,

it cannot be looked to for the purpose of ascertaining if it is correctly described in the condition of the bond. In Glasscock v. Dawson, [1 Mumf. Rep. 605,] a writ of *fieri facias* issued against an administratrix, "to be levied as to certain damages and costs of the goods and chattels of her intestate, and as to other damages and costs of her own goods and chattels," and was returned "executed on certain slaves the property of the administratrix, a forthcoming bond taken," &c. The bond being given by the administratrix *eo nomine*, but expressing that the execution was against her goods and chattels, it was decided to be variant from the *fi. fa.* and at the instance of the obligors was quashed. In that case the execution was not made a part of the record by any act of the primary court, yet it was held to be competent on appeal to compare it with the bond for the purpose of testing the question of variance. So, in Couch v. Miller, [2 Leigh's Rep. 545,] it was held to be competent for the obligors in a forthcoming bond to move to quash it. The objection was that the *fieri facias* was directed to the sheriff of Campbell county, but delivered to, and levied by the sergeant of the city of Lynchburg, situate in that county; it was held, that the writ gave no authority to the sergeant, and no warrant to him to take the forthcoming bond; that the bond was variant from the execution; and it was therefore quashed. *Further*, it was decided, that upon a motion to quash the bond because it does not conform to the execution on which it was taken, an appellate court will consider the execution as a part of the record, though not made so by any express order to that effect. [See also, Hubbard v. Taylor, 1 Wash. Rep. 259; Downman v. Chinn, 2 Id. 189.]

We will not undertake to consider, whether to have authorised the circuit court to entertain the motion submitted by the defendants, it was necessary that notice should have been given to the plaintiffs, [Wilkerson, et al. Branham, at this term,] as the judgment upon the motion expressly affirms the appearance of the parties by attorney, and the argument of counsel thereon. This is quite sufficient to show that both parties were before the court, and is either an admission or a waiver of notice. [Bondurant v. Wood and Adams, 1 Ala. Rep. N. S. 542.]

The view taken disposes of the objections made by the counsel for the defendants, and we have now but to compare the bond and the *fieri facias* recited in the condition. The execution is-

sued against the goods, &c. of John Lunsford, William H. Carter, Langdon J. Morris, and Andrew J. Stephens, while the bond describes it as having issued against the goods, &c. of *John Lunsford* only—the aggregate of debt, damages and costs which it requires to be made is $2,492 50-100, while the bond states the amount to be $2,743. These discrepancies it is believed are so great, that we cannot say from an inspection of the execution in the record, that it is the writ to which the bond refers. The misdescription is such, that it cannot be identified with reasonable certainty; the execution being placed out of the way, there is nothing to sustain the bond, and the circuit court should have quashed it. Consequently the judgment is reversed, and the bond adjudged to be insufficient to authorise an execution thereon. My brothers desire me to add, that in attaining this conclusion it is not intended to determine in advance whether the bond is void at common law.

BRANCH BANK AT HUNTSVILLE, v. ROBINSON, SHERIFF.

1. K, a debtor to the Bank, proposed in writing to the Bank, to discharge his debt in State stock, in a reasonable time; the Bank acted on the proposition, and modified it by making alterations in its terms, and offered to receive the stock on the terms thus proposed, within one hundred and twenty days. This proposition K, as a witness stated, *agreed* to, but did not notify his assent to the Bank: *Held*, that neither K, or the Bank were bound by the arrangement, and that therefore the sureties of K, were not discharged.
2. An order made by the directors of the Bank, after the time within which the stock was to have been delivered, enlarging "the time for the execution of the *contracts* heretofore entered into between this board and B. P, and John Kinkle, for the payment of their debts to this Bank, in State bonds," does not show, in the absence of proof to the contrary, that the previous proposition had been assented to.
3. A direction by the plaintiff to the sheriff, not to levy several executions which had successively issued, will not render a subsequent execution upon which no

such direction had been given, *dormant*, as against creditors of the defendant, claiming under a deed of trust, made after the last execution came to the sheriff's hands.

ERROR to the County Court of Madison.

This was a motion by the plaintiff, suggesting that the defendant, as sheriff of Madison county, by proper diligence, could have made the money on an *alias pluries* writ of *fierie facias*, which issued in favor of the plaintiff, on a judgment of the plaintiff for one thousand and eleven dollars six cents, besides costs, against John Kinkle, R. B. Purdom and Cortz D. Kavanaugh, which writ came to the sheriff's hands on the 5th September, 1842. The defendant having filed a plea traversing the facts of the suggestion, the jury, under the charge of the court, found a verdict in his favor.

Pending the trial, a bill of exceptions was taken, from which it appears that the plaintiff having shown the receipt of the *fi. fa.* by the sheriff on the 5th September, 1842, and property in the hands of Kavanaugh, one of the defendants, sufficient to satisfy it, rested his case.

The defendant proved that several executions had previously issued on the same judgment, all of which were stayed by agreement between the bank and the defendants to the execution; that the note on which the judgment was founded, was made by Kinkle, and that Kavanaugh was the second endorser; that all the parties to the note except Kavanaugh, were insolvent.

That on the 9th September, 1842, Kavanaugh, for a valuable consideration, conveyed his property in trust, to secure certain creditors, which was duly recorded. The defendant also read the following letter from Kinkle to the Bank, together with certain extracts from the minutes of the board of directors.

"Extract from the Minutes of the Board:

Branch of the Bank of the State of Alabama at Huntsville, 13th October, 1842.

The following communication from Mr. John Kinkle, was submitted and read:

GENTLEMEN—From the enclosed statement, you will perceive that Caruthers & Kinkle and John Kinkle, owe your bank a balance of suspended debt, of $7208 08. This debt has been

dragging along since 1835, and has been reduced from time to time to the amount as shown above. Mr. Caruthers has made no provision for any part of said debt, and the whole has fallen upon me. The last of my means has been applied to the payment of this debt, and I have nothing left me beyond my daily wants. I am extremely anxious to relieve myself of my embarrassments, and place myself right side up once more, and commence anew. Therefore, I make you the following propesition, viz: I will pay you $15,000 in State bonds, at par, out of which I will extinguish the above debt, the bank paying me the balance in money, on the delivery of the bonds at such place as may be agreed upon, your board giving me a reasonable time to carry out the same.

Very respectfully,

JOHN KINKLE.

To the President and Directors of the Branch Bank at Huntsville.

Whereupon, Mr. Bradley offered the following preamble and resolutions, which were adopted:

Whereas, the debts due from Caruthers & Kinkle, to this bank, amounting at this time, including interest and costs, to about $6,423 33 is considered extremely doubtful; therefore, Resolved, that upon the delivery by John Kinkle, of $12,000 of Alabama State bonds, redeemable by this bank to the agent of this bank in New York, John J. Palmer, or to the President or cashier of this bank here, within one hundred and twenty days from this date; that then the cashier of this bank be instructed to give the said Caruthers & Kinkle, credit for them at par, out of which he shall deduct the aforesaid debts of Caruthers & Kinkle, and also a debt of John Kinkle, amounting at this time, with interest and cost added, to about the sum of $864, and pay the said Kinkle the balance in the notes of the State Bank or any of its branches, and no part of said contract shall be executed, until the whole amount of the $12,000 of State bonds, shall have been delivered by the said Kinkle as before stipulated."

Also, the further extract from the Minutes of the Board, on the 16th February, 1843.

"Resolved, That the time for the consummation of the contracts heretofore entered into between this board and Benjamin Patterson and John Kinkle, for the payment of their debts to this

bank, in State bonds, be extended to the 25th December next, (1843.")

It was further proved by Kinkle, that he agreed to the modification of his proposition, as made by the bank, but had never given any notice thereof to the bank. This being the proof, the court charged the jury that if they believed the testimony, they must find for the defendants. To which the plaintiff excepted, and having prosecuted this writ, now assigns it as error.

McClung, for plaintiff in error, contended, that the proof did not show any contract by which the bank had precluded itself from proceeding at any moment to collect its debt from Kinkle, the principal, and that therefore the surety was not discharged; that what the courts considered a contract, was a mere proposition not assented to by Kinkle, so as to be binding on him, and therefore, if it would under any circumstances have been a *contract*, was not under the facts of the case.

That admitting it to be such a contract as would absolve the surety, the sheriff could not avail himself of it; the issue was simply whither the money could have been made by due diligence from Kavanaugh.

Robinson, *contra*, maintained that there was a valid contract between Kinkle and the bank, on sufficient consideration, as the bank was thereby to secure a doubtful debt; and that it was a contract, was shewn by the last resolution of the board of directors, in which it was treated as such, and still subsisting. That if the bank could not recover of the surety, it could not recover of the sheriff, as the sheriff would have been a trespasser if he had proceeded to levy or sell, after the surety was discharged. He cited, 1 Stewart, 262; 2 ib. 63; 3 ib. 14; 6 Porter, 166; 8 ib. 108; 3 Ala. 335; 4 Dallas, 168, note 1, 213, 358; 2 Johns. 417; 8 ib. 20; 11 ib. 110; 15 ib. 429; 17 ib. 274; 1 Wilson, 44; 4 Wend. 332; 12 Wend. 405; 5 Cow. 396.

ORMOND, J.—Waiving for the present, the consideration of the question, whether the proposition of Kinkle, if acceded to by the bank, would have prevented the latter from pressing its execution against the former, before a breach of the agreement, we will proceed to the enquiry whether, under the facts disclosed by

the record, there was a valid agreement between the parties, by which the bank was bound to hold up the execution until the time for the delivery of the stock had arrived, and there was a failure to deliver it.

The question of the effect of agreements entered into between the creditor and the principal debtor to the prejudice of a surety has been repeatedly considered by this court; and in a recent case, [Fletcher v. Gamble, 3 Ala. 335,] the doctrine was again examined at some length, and the authorities reviewed. It is there stated that the reason that giving day of payment operates to discharge the surety is, that the creditor has by his own act deprived himself of the power of doing that, which the surety has a right to call on him in a court of equity to do, to sue the principal; and has also deprived the surety of his right of paying the debt, and proceeding himself against the principal. The question then is, whether under the facts disclosed, the bank had deprived itself of the right of coercing payment from Kinkle, for a stipulated period.

It appears from the proof, that the latter made a proposition in writing to the former, to pay his debt in State stock, upon certain conditions; this proposition was not acceded to as made, but a modification was made in it by the bank, which, as modified, it offered to accept. It appears that Kinkle never notified the bank that he accepted the offer made by it, and it cannot require any argument to show that the proposition of the bank was not binding on either until assented to by Kinkle. The latter states, that he agreed to it, but did not notify the bank of his assent. The assent to be binding on Kinkle, must have been such as the bank could have availed itself of and enforced. The mental acquiescence should have been manifested by some act susceptible of proof; otherwise, as it was not legally binding on Kinkle, it could not be enforced by the bank, and was therefore not legally binding on either.

It is further argued, that the subsequent order made by the bank, enlarging the time within which it would receive the stock, is an admission on the part of the bank, that the agreement was consummated. This order was made by the bank on the 16th February, 1843. The period within which the bank, by its first proposition agreed to receive the stock, in payment of its debt, (one hundred and twenty days) had expired on the 10th Februa-

ry, and this was, in law, and in fact, a new offer made by the bank to receive stock in payment of the debt, and the previous proposition is referred to, as showing the conditions on which the offer is made. This proposition, like the former, does not appear to have been acceded to by Kinkle, and, for the reasons already given, was not binding on either party.

Some stress was laid in argument upon the phraseology of the last order made by the directors of the bank, in which the former proposition of the bank is called a "contract." It is very certain that the mere designation of the former proposition as a *contract*, does not make it one, and although it might be conceded, in the absence of proof to the contrary, that this was an admission that the first proposition had been assented to, so as to be binding on both parties, no such result can follow when the contrary is shown to be the fact. To hold otherwise, would be to make this order operate as an *estoppel* by which the bank was concluded from showing the truth.

It was further contended that as several previous executions had issued, which the sheriff did not levy by the direction of the plaintiff, the sureties consenting thereto, that this execution, in reference to which no such direction had been given, had become dormant, and therefore void against junior judgment creditors, and purchasers. In the case of Woods v. Gary, at the last term, the question of what facts would render an execution dormant and void, as to junior judgment creditors, was considered.

We then held, that a direction by a plaintiff to hold up and not to levy an execution, would render it *dormant*, and give a preference to the execution of a *junior* judgment creditor subsequently issued; but that such delay, if not fraudulent in fact, would not impair the *lien* of the execution, when re-issued as against a junior judgment creditor, whose execution was not issued until after the return day of the execution of the older judgment.

There is no pretence here, that the delay which was assented to by all the parties, was fraudulent in point of fact, nor could it by possibility injure any one who had not then an execution against some of the defendants in the sheriff's hands. The last execution came to the sheriff's hands on the 5th September, 1842, and if no previous *lien* existed, one attached then in favor of the bank. This was five days before the deed of trust relied on was executed, and shows that the bank had the *prior lien*,

It might perhaps be questioned whether the sheriff could interpose such a defence to excuse his neglect; but as that point is not necessary to the decision of the cause, we forbear any comment upon it. Let the judgment be reversed, and the cause remanded.

THE OSWITCHEE COMPANY v. HOPE & CO.

1. The commissions allowed by law, upon the levy of a *fierie facias*, should not be taxed by the clerk in the bill of costs.
2. It is competent for a party, at whose suit civil process issues, to suspend its energy, by directing the sheriff not to execute it; and where the sheriff is instructed not to levy a *fi. fa.* until further orders, or to hold it merely to bind the debtor's property, in neither case, can the officer claim fees for the disobedience of instructions.
3. A motion to the court to adjudge to the sheriff, costs upon an alleged levy of a writ of *fi. fa.* even if grantable under the facts of the case, should be preceded by a notice to the defendant in execution; and an order made in such case, will be considered as so far void, that the court making it, may quash an execution issued thereon.
4. Where the petition for a *supersedeas* refers to the execution, and prays that the same may be superseded, the execution is thereby made part of the record, and will be so regarded by an appellate court.
5. Where an execution is superseded upon a petition filed in vacation, it is not necessary for the defendant in execution to move the court to quash it; the petition itself, is a motion to that effect, and may be so considered even where a *supersedeas* has improvidently issued.

Writ of Error to the Circuit Court of Russell.

The defendants in error, being merchants and partners in trade, under the style of "Hope & Co." recovered a judgment against the plaintiffs, doing business together in the name of "The Oswitchee Co." An execution was issued on that judgment, and placed in the sheriff's hands on the 1st June, 1842, which by his indorsement thereon, appears to have been levied

on sundry tracts of land. Afterwards, on the 13th August, 1842, the sheriff made the following return, viz: "Levy dismissed and proceedings stayed by order of Jones & Benning, plaintiffs attorneys."

At the term of the circuit court, holden in October, 1842, a motion and order thereon were made as follows: "motion to direct the clerk to tax costs, so as to include one half the usual commissions of a full commission. *Hooper, for motion.*"

"Whereupon, it is on motion ordered, that the clerk be directed to re-tax the cost, and to tax for sheriff's commissions on the levy already made on the execution in this case, one half of the amount of commissions chargeable in cases where full collection has been made." Under this order the clerk taxed half commissions on the sum required to be made by the execution, amounting to the sum of twenty-eight hundred and fourteen 50-100 dollars; and thereupon issued an *alias fierie facias* on the 22d of November, 1842, requiring the sheriff to make the damages and costs expressed in the original, and the additional costs ordered to be taxed by the court. On the 28th March, 1843, the sheriff returned the alias *fierie facias* indorsed thus: "Proceedings stayed by order of Jones & Benning, plaintiffs attorneys."

On the 8th December, 1842, the defendants in execution presented their petition in writing to a judge of the circuit court, praying the court to supersede that execution as to the half commissions thereby required to be made; and an order was made granting a *supersedeas* on the terms prescribed by the statute. The grounds on which a *supersedeas* was prayed are, 1. Because the sheriff was directed and ordered by the plaintiffs, before the original *fi. fa.* was placed in his hands, not to levy it, but retain and return it to the clerk who issued it, with the appropriate indorsement thereon; notwithstanding this direction, the sheriff did levy that execution on the defendant's property, and retained the execution until the day of its return, but without ever having advertised the property for sale. 2. Because the half commissions were taxed without any notice having been given to the defendants in execution, or appearance by them. At the succeeding term of the circuit court, an entry was made reciting the judgment, and all subsequent proceedings, and rendering a judgment upon the *supersedeas* as follows: "And now at this

term the matters and things contained in said petition, being heard and considered of by the court, the same is discharged and held for nought. It is therefore considered by the court that said defendant take nothing by their said *supersedeas*, and that said plaintiff recover of the said defendant the cost in this behalf expended, for which let execution issue." To revise this last judgment, the defendants have sued out their writ of error.

Belser and Hayne, for the plaintiffs in error, made the following points. 1. It is not regular for the clerk to tax such costs as may accrue to the sheriff after the execution is placed in his hands; a re-taxation implies that the costs had been improperly taxed, which was not the case in the present instance. 2. If it had been proper to grant such a motion, the defendants should have had notice that they might shew cause against it. [See 10 Mass. Rep. 26, 1 Pick. Rep. 211; 1 Johns. Cases, 32; 2 Id. 114; 4 Hals. Rep 383; 2 Wend. Rep. 244.] 3. If the levy had been justifiably made, perhaps the sheriff might have refused to discharge it until he made his commissions of the defendant. [5 Term Rep.] But having returned the execution, he had no remedy against the defendant, but must look to the plaintiffs or their attorney. [See 1 Caine's Rep. 192; 5 Johns. Rep. 252; 4 Wend. Rep. 479; 6 Wend. Rep. 535; 9 Id. 435; 17 Wend. Rep. 14; 7 Taunt. Rep. 5.] 4. The plaintiffs had the right to control their execution and the levy, became inoperative for any purpose, and no consequences followed its suspension prejudicial to the defendants. [3 Wash. C. C. Rep. 60; 3 Cranch's Rep. 1; 4 How. Rep. 130.] 5. The discharge of the *supersedeas* does not appear to have been ordered, because the facts stated in the petition were untrue; the recitals in the order show that the facts were not controverted, but that the court refused to quash the execution because it issued under the sanction of the order re-taxing the costs. 6. The levy was irregular and unauthorised, because against the plaintiffs orders. 7. The facts disclosed in the petition, authorised the *supersedeas*. [Lockhart v. McElroy, at the last term: See also 3 Porter's Rep. 335.] 8. It was not necessary that the facts should have been set forth in a bill of exceptions, the petition, execution, &c., may be looked to as parts of the record. [5 Porter's Rep. 103.]

HEYDENFELDT, for the defendant, insisted, 1. That the sheriff's commissions stood upon the ground of other costs, and were properly taxable in the bill of costs by the clerk [Aik. Dig. § 1, 184, 188; Id. § 2, 190, and § 6, 191.] 2. Notice was not necessary to authorise a taxation of the sheriff's commissions; the proceeding may be assimilated to a motion to amend a judgment, to render judgment *nunc pro tunc*, or to substitute papers—in all which, notice according to the decisions of this court, is not required. 3. If the *supersedeas* was dismissed upon extrinsic proof, then as there is no bill of exceptions, the court cannot revise the decision. 4. But it is contended, that the dismissal was proper, the *supersedeas* had performed its office, viz: suspended the execution until court, and the proper course for the defendants to have taken, was to move to quash the execution. In fact the *supersedeas* could not have been continued in force, for it not only prevented the collection of the commissions, but of the damages which the plaintiff's had recovered.

COLLIER, C. J.—It is not the appropriate office of the clerk to tax in the bill of costs, the commissions allowed by law, to the sheriff, consequent upon his levying a writ of *fierie facias*. As it cannot be known when the writ issues, whether he will be entitled to any commissions, or how much, no express authority can be conferred by the execution to make any. Our practice has been invariably for the officer levying a *fi. fa.* to collect as an incident to the sum adjudged to the plaintiff, all consequential costs. But it is unnecessary to consider this point further, as the record presents other questions of more prominency, which are decisive of the case.

It may be conceded, that under our statute in respect to the fees of sheriffs, [Aik. Dig. 188,] that the sheriff is entitled to the half commissions allowed thereby, after the levy of a *fierie facias*, although the parties enter into a compromise, or the plaintiff directs a stay of further proceedings, so as to dispense with a sale. [See also Watson's sheriff, 79.] But this is the case only when the levy is regularly and justifiably made. Where civil process is placed in the sheriff's hands, it is entirely competent for the plaintiff to suspend its energy by directing him not to execute its mandate. It is certainly the duty of an officer to obey with promptness all process committed to his hands; but the nature of

his office does not require that he should set at defiance the directions of him for whom the writ shows he was called on to act. If he is instructed not to levy an execution until further orders, or merely to hold it, as it is sometimes called, to bind the debtor's property, in neither case can the officer claim fees for the disobedience of instructions. True, the sheriff is a public officer, necessarily possessing extensive powers and held to strict accountability; he is an agent provided by the law, to aid in the administration of justice; yet in the execution of process in suits between individuals, he must also be regarded as the agent of the party who is the actor. This conclusion is enforced by the reason and convenience of the thing, as well as by the fact that its correctness has always been acquiesced in, in practice. A *fierie facias* is never placed in the hands of an officer with a view merely to his own benefit, but that he may make the money which has been adjudged against the defendant therein. The idea, then, that in despite of directions to the contrary, the sheriff may levy on and sell the debtor's property, cannot be tolerated. Such a conclusion would assume that the execution of the judgment was beyond the plaintiff's control, or that the officer was authorised to proceed with a view to his own emolument only, both of which assumptions we have said were alike unfounded. The commissions allowed to a sheriff are not a mere gratuity, but are intended as a compensation for services performed, and unless this compensation be earned by the performance of the service in a legal and justifiable manner, he cannot insist upon receiving it.

But if it were conceded that half commissions were due to the sheriff, so far as any thing appears to the contrary, no order directing their taxation would be regular, unless the defendant in execution had notice of the motion. True, we have held, that no notice was necessary in order to authorise a judgment *nunc pro tunc*. [Allen & Dean v. Bradford, & Shotwell, 3 Ala. Rep. 281, and cases there cited,] or to obtain leave to substitute papers in a cause for those which have been lost. [Wilkerson, *et al.* v. Branham, at this term.] In the first case, the motion is founded on matter of record, and is intended to give effect to a previous order of the court; in the latter to give to the plaintiff the benefit of his judgment, by putting the record in the same condition in which it was when the judgment was rendered; the legal intendment in both is, that the defendant is in court to gainsay

the motion, if he thinks proper. The motion in the present case proposed something more, it was to adjudge the defendents liable to pay a sum of money beyond what was determined by the judgment; it was not intended to perfect that which was merely incomplete, or to substitute lost papers, and the cases referred to, are dissimilar not only in their facts, but in principle also. [Baylor v. McGregor and Darling, 1 Stew't and Porter's Rep. 158,] is in principle analogous to the present. There, a motion was made to direct the sheriff to enter a credit on an execution, and to compel satisfaction of the judgment to be entered of record. The only notice to the adverse party, was an entry on the motion docket, and this, it was holden, did not warrant the implication, that the defendant was advised of what the court was asked to do. In the case at bar, the order gives to the plaintiff, for the sheriff's benefit, an execution for a sum beyond what the judgment authorised; it was in point of fact equivalent to the rendition of a distinct and independent judgment, and upon general principles required that the notice should have preceded it. The mere entry upon the motion docket, is not a notice of what it imports, except as between parties, who in legal contemplation, are in court.

The legal inference from the judgment upon the *supersedeas*, is not that it was dismissed after a controversy upon the facts, but the form of the entry very clearly indicates, either that the petition, assuming it to be true, did not authorise the court to quash the execution, or that the order to tax half commissions, made at a previous term, was conclusive upon the court. From what we have said, it is clear, that the facts stated in the petition show the order to re-tax costs (as it has been inappropriately called,) was unauthorised by law. But it is supposed that if this be conceded the inference does not follow that the *supersedeas* should have been sustained, but the legal presumption is, that the order to tax costs was decisive of all the facts stated in the petition, and if the defendants are aggrieved, they should have appealed from that order. Without stopping to consider whether this reasoning can be sustained in a proper case, we are satisfied that it is inconclusive in the one now before us. The order was a proceeding *coram non judice*, for the reason that the defendants had no notice that it would be moved for. It was made at a time when the court had no jurisdiction over the defendants, or the subject,

for the want of that indispensable prerequisite to the action of courts, viz: a notice direct or implied, to the party sought to be charged with a debt or duty. This being the case, it was merely void, and afforded no warrant for an execution to issue. *Ex parte*, Sanford, at this term.

The reference of the petition to the execution, if nothing else, brought it to the view of the circuit court without its production; in fact it became part of the record of the prooceeding by *supersedeas*, and could not be made more so, either by a bill of exceptions, or an express order of court. [Lunsford, *et al.* v. Richardson & O'Neal, at this term.]

In respect to the argument, that the *supersedeas* was only intended to suspend the execution until court, that the defendants should have moved to quash it, and cannot now object (as no such motion was made,) that the *supersedeas* was discharged, we are of opinion that it is not defensible. The judgment directing that the defendants shall take nothing by their *supersedeas*, is equivalent to a declaration that the execution should be enforced. No specific motion to quash, was necessary by the defendants, their petition brought the matter before the court, and was in itself a motion to that effect. [See Gates v. McDaniel, 3 Porter's Rep. 356.]

That the *supersedeas* was properly granted, will not admit of serious question since the decision in Lockhart v. McElroy, at the last term. But if irregularly awarded, the court even then should not have dismissed it, but treated the petition as a motion to quash the execution. [Gates v. McDaniel, *supra.*]

Although it is inferrable that the order to tax commissions was made at the sheriff's instance, we have not thought necessary to remark on it, in that point of view; for if the facts stated in the petition are true, there can be no doubt but the levy of the execution was unjustifiable in law, and that no commissions are due therefor.

We have only to add that the judgment of the circuit court is reversed, and this court, proceeding to render such judgment as should have been rendered by that court, directs that the execution in question be quashed, without prejudice to the plaintiffs right to proceed on their judgment.

GAREY, ET ALS. v. FROST & DICKENSON.

1. A summary proceeding commenced by motion, when the parties appear and an issue is tried by the jury, is then like any other suit commenced in the ordinary mode, and to be governed by the same rules, with the single exception that it must appear on the record, that the court had jurisdiction.
2. When the sureties are not parties to the motion, the fact of suretyship cannot be found by the jury, but should be proved to the court, and it should appear on the record, that such proof was made.
3. A witness cannot be excused from testifying against the sheriff, on a motion against him, on the ground that he is one of his sureties, unless he is a party on the record, to the motion.
4. Whether the *declarations* of one as to the ownership of goods, of which he has the possession, cannot be given in evidence—*quere*.

ERROR to Sumter County Court.

This was a proceeding by the defendants in error, against the plaintiff in error, as sheriff of Sumter, suggesting that he could have made by due diligence, the money on an execution of the defendants in error.

The sheriff appeared, and issue being joined on the suggestion, the jury found the issue for the plaintiff, and that the sheriff could by due diligence, have made the money on the execution of the plaintiff, and it being made to appear that certain persons were the sureties of the sheriff, judgment was rendered by the court against the sheriff and his sureties for the amount of the execution, ten per cent thereon, and the costs of the execution, as well as the costs of the motion.

Pending the trial, a bill of exceptions was taken which, with a great deal of superfluous matter, not necessary to be here noticed, shews that the plaintiff produced a witness who proved that Calvin Davis, one of the defendants in the execution, resided near him in Sumter county, that he made from forty-five to fifty bales of cotton, in 1841, besides corn, and had from 19 to 21 of the bales on hand, until the last of May, 1842, the residue having been shipped by him previously. The witness was well acquainted with Davis; passed by his gin house frequently and saw

the cotton there. Witness was then asked if he knew of his own knowledge, the last mentioned cotton shipped, to be the property of Davis; he said he did not, but that Davis had so informed him. The defendant's counsel objected to this testimony going to the jury, but the court overruled the objection, and the testimony went to the jury.

It also appears that the counsel for the plaintiff and defendant, could not agree as to the testimony of the witness, and the court not recollecting it, it was by consent, left to the jury to say what the testimony was, who returned the above, and that their verdict was founded upon it.

The defendant also offered in evidence, an execution in favor of another plaintiff against Davis, one of the defendants in the execution, upon which this rule was founded, and upon which the sheriff had levied property and sold the same to the value of $259 07. The plaintiff then introduced a deputy of the sheriff, who was also one of his sureties in his official bond, and proposed to ask him whether the said execution had not been previously paid off, and by whom: to the introduction of whom the defendants counsel objected, insisting that he was incompetent, and could only be examined by interrogatories under the statute, and also that it would be compelling him to testify against himself; but the court overruled the objection, and required him to testify, who, then answered, that he had paid the judgment previous to the execution having issued, and was then running it to reimburse himself—to all of which the defendant excepted, and now prosecutes this writ of error.

The assignments of error are,

1. Because judgment is rendered on a suggestion, different from that filed and on which trial was had.

2. Because it is not alleged that either of the persons against whom judgment is rendered as sureties, were sureties of the sheriff, nor were they parties to the rule or pleadings, or present in court.

3. It does not appear that the execution on which the rule is founded, came to the sheriff's hands or was subject to his control, during the life of the same.

4th. Because it is not shewn that Gary was sheriff of Sumter, during the life of the execution, or that the other plaintiffs in error were his sureties, at any time before the trial.

5th. Because the jury do not find all the facts alleged in the suggestion.

6th. Because the court decided matters of fact which should have been left to the jury.

7th. Because the judgment is not authorised by the facts found.

8th. The judgment is too large, as appears by the record.

9th. Because it is not alleged, nor does it appear that the money had not been made on the execution.

10th. The jury did not assess any sum for which judgment should have been rendered.

11th. The court erred as set forth in the bill of exceptions.

Bliss & Baldwin, for plaintiffs in error.

Smith, *contra.*

ORMOND, J.—In the case of Smith v. The Branch Bank at Mobile, during the present term, we gave the result of the cases to be found in our books upon the law of these summary proceedings. It appears not to be understood, although repeatedly decided, and especially in the leading case of Currie v. The Bank of Mobile, [8 Porter, 360,] as also in many subsequent cases—that in these summary proceedings, when the parties appear and an issue is tried by a jury, they are then like other suits in court commenced in the ordinary mode, and to be governed by the same rules which govern other suits, when a judgment is rendered upon the finding of a jury, with the single exception, that it must appear affirmatively on the record, that the court had jurisdiction to entertain the motion.

In this case, the sheriff appeared and contested the facts contained in the suggestion; the finding therefore by the jury of the issue against him, ascertains the truth of these facts, and his liability to pay the amount of the execution, results as a conclusion of law, which is embodied in the judgment of the court. The liability of his sureties, is a legal consequence of *his* liability upon its being made to appear to the satisfaction of the court, who the sureties are. This the record shows was done in this case, and the judgment therefore against them, as well as the sheriff, was properly rendered.

Nor was it necessary that the sureties should have been parties to the motion against the sheriff, or, that the fact of their surety-

ship should have been found by the jury. When they are parties to the proceeding, and submit the case to a jury, the fact of their suretyship as well as the liability of their principal, would be established by the finding of the jury against them. Where, however, the sureties are not parties, as was the case here, the proper course is to prove the fact of suretyship to the court, and the fact that such proof was made, should appear upon the record, as it does in this case. Reid v. The Planters' and Merchants' Bank. [3 Ala. Rep. 712.]

This view disposes of all the assignments of error, except those predicated on the bill of exceptions, the principal part of which are framed on the errroneous supposition that the facts found by the jury, should appear to have been proved to the satisfaction of the court.

We proceed to the consideration of the questions presented on the bill of exceptions. The plaintiff, to establish the ability of one Calvin Davis, a defendant in the execution, to pay the debt, introduced a witness who swore that he lived near, and was well acquaintaned with him; that Davis raised some forty-five or fifty bales of cotton in 1841, besides corn—that about February, he shipped part of the cotton, and had remaining on hand, from nineteen to twenty-one bales, which were shipped about the first of May. That he passed frequently by the gin house, and saw the last mentioned cotton. He was then asked, if he knew of his own knowledge, the last mentioned cotton, to be the property of Davis; he said he did not, but that Davis had so informed him. The defendant's counsel objected to this testimony, but the court permitted it to go to the jury.

The point to be established was, that Davis was the owner of the cotton; this was sufficiently shewn *prima facie*, at least by the proof adduced, that the cotton was raised by him, continued in his possession, and that he exercised acts of ownership over it. We cannot well see how a stronger *prima facie* case of ownership of property could be made out, nor can we perceive that the case was varied in the slightest degree, by the additional proof, that Davis also *claimed to be the owner of the cotton*, there being no adverse claim set up to it, or proved to have existed.

The question is very loosely presented on the bill of exceptions; the facts stated, do not appear to have received the sanction of the court, but to have been left to the jury to determine what

they were—the objection is to the *testimony* going to the jury, and not to the *answer* to the last question asked the witness. Under these circumstances, and as it is impossible that the plaintiff in error could have been injured by proof of the declarations of Davis, when accompanied by the other *indicia* of ownership of the cotton, which were in proof, we would not reverse the cause, because these declarations went to the jury, even if we were satisfied that a *declaration of a claim to property connected with the possession*, was not admissible in evidence as part of the *res gestae*. To this point, see Willies v. Farley, [3 Carr. & Payne, 395.]

The defendant having introduced an execution against Davis, in favor of another plaintiff, and proved a levy and sale of property under it, the plaintiff called a deputy of the sheriff, who was also one of the sheriff's sureties, to prove that the judgment on which the execution had issued, had been previously paid. The counsel for the defendant objected to his introduction, because it would be compelling him to give testimony against himself. But the court overruled the objection, and he then testified that he himself had previously paid the judgment, and was running it for his own benefit.

The question here is not whether a witness can be compelled to disclose a fact, tending to establish that he owed a debt, or which might subject him to a civil action, about which there has been some difference of opinion, but it is that he had an interest to withhold from the court and jury, a fact within his knowledge, supposed to be important in the investigation before them. This has never been considered a sufficient reason for excusing one so circumstanced, from giving evidence.

A party to a suit cannot be a witness to maintain his own cause, neither can he be compelled in a court of law, to testify against himself. Although the witness in this case, was surety for the sheriff, yet he was not a party on the record, at the time of his examination as a witness. It is true that he became so afterwards by the rendition of a judgment against him jointly, with the sheriff, but this was not a necessary result of a judgment against the sheriff on the issue before the jury, but depended on the proof of a fact separate and distinct from the issue then before the jury, which proof was to be made not to the jury, but to the court. It was therefore altogether uncertain when he testi-

fied whether any judgment would be rendered against him or not and upon any view of the subject which has presented itself to our minds, he was not privileged from testifying in favor of the plaintiff below.

Upon an examination, it appears that there is a miscalculation of interest, which will be corrected by the clerk, at the cost of the plaintiff in error.

PERINE & CROCHERON v. GEORGE.

1. E G, a garnishee answered, that S G was indebted to A S, in the sum of $5,000, and to secure its payment, conveyed to him a house and lot by way of mortgage; afterwards the same property was sold under a *fieri facias* against the estate of S G, and A S became the purchaser; subsequently, A S sold it at public auction, and E G bid it off at $10,005—having first agreed with A S, that upon the payment to A S, of the sum of $6,000, the amount due him on the mortgage and the sum advanced on the purchase under execution, the latter should relinquish to him the residue of the sum at which the property was b'd off, remarking that he, E G, and S G might do as he pleased with it: *Held*, that the answer of the garnishee did not show such an indebtedness to S G as authorized the court to render a judgment against him: that if S G had an interest in the property, either as mortgagee or by contract with Saltmarsh, he could not reliuquish it without consideration to E G, so as to defeat his creditors, but himself or his creditors must assert that right in equity.

Writ of Error to the Circuit Court of Dallas.

The plaintiffs in error recovered a judgment against Stewart George, in the County Court of Dallas, and filed their affidavit under the statute, on which garnishment issued to the defendant, requiring him to appear and answer on oath what he was indebted, &c. to the defendant in the judgment. Thereupon, the garnishee answered that he became the purchaser on the fourth of July, 1842, of the tavern in the town of Cahawba, called the Cahawba

hotel, at public auction, for the sum of ten thousand and five dollars: that the property was sold by Alanson Saltmarsh as his own, and other persons were present at the sale, and bid for it—one of them bidding as much as ten thousand dollars. The tavern had previously belonged to Stewart George, the brother of the garnishee, but becoming greatly involved in debt, he gave Saltmarsh mortgages on the same to the amount of five thousand dollars. A short time previous to the sale at which garnishee purchased, an execution against the estate of Stewart George was levied on the tavern, and it was sold thereunder to Saltmarsh, who became the purchaser (as he said) to secure the payment of his demands; the amount of which mortgages, and execution included, were six thousand dollars. Before the sale at which the garnishee became the purchaser, it was fully understood between himself and Saltmarsh, that the latter had no claim on the property for any thing more than six thousand dollars, and relinquished his right to all beyond that sum to the garnishee, telling him that as between himself and his brother, he (the garnishee) might do as he pleased with the purchase money over that sum. Garnishee and his brother agreed, before the former became a bidder for the tavern, that no matter at what price he bid it off, he was only to pay the amount of Saltmarsh's demand; if the purchase was made at a sum beyond, he was not to be liable for the payment of the excess to any one. Stewart George, at that time, was much embarrassed, but had always been in possession of the tavern, and the garnishee made the arrangement for the purchase, in order "to accommodate him, and relieve him from his difficulties."—That the balance of the sum bid, after paying Saltmarsh, was four thousand and five dollars, which garnishee has never paid to any person. Garnishee then declares, that he was not indebted at the service of the garnishment, to the defendant in the judgment, in any sum whatever, &c. On this answer the court rendered a judgment against the garnishee, for the sum of six hundred and eighty-five 06-100 dollars, being the amount due on the judgment against Stewart George.

The cause was removed by writ of error from the county to the circuit court, and there reversed, on the ground, that the answer of the garnishee did not disclose such an indebtedness as authorised the judgment against him; and the correctness of the latter judgment is now assigned for error.

Wm. Hunter, for the plaintiff in error. The answer of garnishee is to be taken all together, and if from a detailed statement of facts a liability to pay money is deducible, the judgment of the county court was correct, although the garnishee may expressly negative an indebtedness. [Mann v. Buford, 3 Alabama Rep. N. S. 312.] 2. Saltmarsh, by his purchase at the sheriff's sale, took the tavern as a security for the amount of his mortgages, and the execution under which he purchased. This is shown by the answer. The interest beyond the six thousand dollars, remained in Stewart George. 3. By the purchase of the garnishee on the 4th July, 1842, he became indebted to the defendant in the judgment, to the amount of four thousand and five dollars, and the agreement between Stewart George and the garnishee, that the latter, if he would pay the demands of Saltmarsh, should hold the property free from all claim of Stewart George, was void as against his creditors, and cannot be upheld at law, or in equity.—[See Cato v. Easley, 2 Stew's Rep. 214; Miller v. Thompson, 3 Porter's Rep. 196; Read v. Livingston, 3 Johns. Ch. R. 431.]

G. W. Gayle, for the defendant in error, insisted, 1. That the defendant in the judgment had no interest in the tavern when sold by Saltmarsh, and the latter gave the purchase money beyond six thousand dollars to the garnishee. This he had a right to do without furnishing any just cause of complaint to Stewart George, or his creditors. 2. The garnishee has denied an indebtedness, and in addition thereto stated facts from which it cannot be inferred. To authorize a verdict against the answer, it should have been found untrue upon an issue regularly made up and submitted to a jury. [See 2 Porter's Rep. 546; 6 Id. 365; 3 Ala. R. N. S. 312; Aik. Dig. 42–3; 2 Stew. R. 86.]

COLLIER, C. J.—Although the answer of the garnishee is not made a part of the record by bill of exceptions, yet it must be regarded as such, as it appears to have been acted on, and made the foundation for the judgment of the county court. The answer concludes with a prayer that the garnishee may be discharged, and the judgment continues thus, "which plaintiffs, by their attorney opposed, and came and moved the court for judgment on such answer, for the amount due for damages, interest, and costs on plaintiff's judgment in this case; which motion be-

ing heard, &c." In fact, the answer and judgment are so incorporated, that it is fairly inferrable that the garnishee made his statement orally in court, and that it was written out by the clerk as a warrant for the judgment.

In Presnall v. Mabry, [3 Porter's Rep. 105,] this court say, "It is a clear principle of law, that a judgment cannot be rendered on the answer of a garnishee, against him, unless there is a distinct admission of a legal debt, either due or to become due, by him, to the defendant in the original suit." But in Mann v. Buford, [3 Ala. Rep. N. S. 312,] it was held, that the garnishee need not admit in express terms that he owes a sum of money to the person whose debtor he is supposed to be, but it is enough if he states facts from which his indebtedness must be inferred. [See also Baker v. Moody, 1 Ala. Rep. N. S. 315.] The denial by the garnishee that he is indebted to Stewart George, would be entirely disregarded, if the facts he discloses showed the reverse to be true, but such cannot be assumed to be the case. He states that Saltmarsh, by the purchase under execution, became the proprieter of the tavern, and was entitled both at law and in equity to hold it against all persons, but was willing to dispose of it for six thousand dollars; being the aggregate of his mortgages and the sum paid upon his purchase under execution, and did actually relinquish the excess beyond that sum to the garnishee, remarking that the latter and his brother might do as he pleased with it. This statement unexplained by any thing else, shows that the garnishee, in virtue of his purchase, became the proprietor of the tavern, free from all liability to pay Stewart George any thing.—Assuming the answer to be true, as we must, in the attitude in which the case is presented, and the inference is, that Saltmarsh became the proprietor of the hotel, and sold it to the garnishee for ten thousand and five dollars, but remitted all above six thousand. That Saltmarsh united in himself both the legal and equitable titles, cannot, upon the record before us, be disputed, and this being conceded, there is as little room for making the garnishee the debtor to the defendant for the sum remitted.

If Saltmarsh did not perfect his title by the purchase at sheriff's sale, but was a mortgagee with, or without a power of sale, then he was incompetent to make the arrangement with the garnishee which is alleged, and the latter by his purchase, would become substituted to the rights only which he had. If Stewart

George, either as mortgagor, or by contract with Saltmarsh was entitled to an interest in the property, it is perfectly clear, that he could not relinquish it to the garnishee so as to prejudice the claims of creditors. Such an interest would be regarded in the same point of view as real or personal estate that was tangible, and the one could no more be given away, or conveyed so as to delay, hinder and defraud creditors, than the other. But if the defendant in the judgment had such a right, of which the record does not sufficiently inform us, it must be asserted in a court of equity, by himself or a creditor. That court is competent to the adjustment of all equities and trusts which may be shewn to exist.

From the view taken it results, that the county court erred in rendering a judgment against the garnishee, its judgment was rightly reversed by the circuit court; and the judgment of the latter court is consequently affirmed.

MOORE v. WORSHAM, SIMS & HARGROVE.

1. A plea by the sureties of a sheriff, that judgments have been recovered against them, as sureties of the sheriff to the amount of the penalty of the official bond, and that the judgments are unreversed, is bad, because it does not aver that the judgments have been paid by them, or that they are still unsatisfied.

Error to the Circuit Court of Russell.

This was a motion by the plaintiff in error, against Worsham, as sheriff of Russell county, and the other two defendants as his sureties for failing to pay over money made by him on an execution of the plaintiff.

The sheriff took issue upon the suggestion, and the sureties offered and pleaded two special special pleas. 1. After craving oyer of the bond, with its condition, and setting it out, the plea proceeds to aver that the penalty of the bond has been heretofore fully recovered in various proceedings against them by motions, according to the statute in such cases made and provided, and

they here show the following judgments recovered against them on account of said bond, and the penalty thereof, as follows, to wit: (reciting the various judgments) amounting to more than $5000, the penalty of said bond; and that said judgments are not in the least reversed, or made void, and this, &c.

The second plea avers that the term of Worsham, as sheriff, expired on the first Monday in August, 1840, at which time he ceased to act as sheriff; that since the expiration of his term of office, the bond and the penalty thereof, has been heretofore fully recovered in various proceedings against them by motions, (which judgments are recited) amounting in all to more than the sum of five thousand dollars, the penalty of the bond, which judgments are not reversed or made void.

To these pleas, the plaintiffs demurred, which demurrer the court overruled. The issue being found against the sheriff, judgment was rendered against him, and in favor of the sureties, to reverse which this writ is prosecuted.

The assignment of error brings to view the judgment of the court, overruling the demurrer to the pleas.

Peck & Clark, for plaintiff in error, insisted that the pleas were bad, because they do not show that the sureties had paid judgments rendered against them for the default of the sheriff to the amount of the penalty of the bond. [6 Cowen, 583.]

Belser and Heydenfeldt, *contra.* The sureties of the sheriff are not liable beyond the penalty of the bond, neither by the statute of the State or at common law, and have a right to stand upon the precise term of their contract. [4 Wash. C. C. R. 26; 9 Wheat. 680; 15 Peters' 209; 18 Johns. 396; 1 McCord, 503; 6 Term Rep. 303; 3 Cowen, 155; 5 ib. 424; 6 ib. 583; 2 Harrington 37; 1 Mass. 308; 1 East, 436; 1 Taunton, 217; 1 Saund. 320.]

Judgments rendered against the sureties for the default of the sheriff since his term expired, to the amount of the penalty of the bond, discharges them from further liability, [3 Dall. 501; 4 ib. 106; 17 S. & R. 381; 2 Brock. 279.]

ORMOND, J.—The pleas in this case merely affirm that judgments have been obtained against the sureties, by motion, for

the default of the sheriff, to an amount exceeding the penalty of the official bond of the sheriff, on which they are sureties, and that these judgments are unreversed, and are defective in not avering that the judgments have been discharged by them, or that they are still unsatisfied. It is entirely consistent with the facts alleged in these pleas, that all these judgments have been satisfied by the sheriff, and if so, there can be no pretence that the payment by the sheriff, would be a discharge of the condition of the bond.

Without now stopping to enquire what would be the effect of a payment by the sheriff of a judgment recovered on the bond against the sheriff and his sureties, as it relates to the further liability of the sureties on the bond, we think it very clear that the proceeding by motion against the sheriff is not a suit on the official bond, nor does his liability for a default in the execution of the duties of his office, arise out of or depend upon the bond which is designed as an additional security to his individual and personal responsibility for the performance of the duties of his office. It is true that upon a motion against the sheriff, judgment may be obtained against his sureties, the right to render which is derived from the bond, and it is very clear they cannot be compelled to pay for the default of the sheriff an amount exceeding the penalty of the bond; but to hold that in such a case a payment by the sheriff of the judgment against him and his sureties would enure in favor of the sureties, and be a discharge of the penalty of their bond, would be to defeat the very object of requiring surety from the sheriff.

The case of the United States v. Cochran, [2 Brock. 274,] was principally relied on to show that a payment by the sheriff would enure to the benefit of the sureties. In that case the principal was a collector of the United States, and absconded largely indebted to the government, leaving ten thousand dollars in a trunk deposited in bank, which he directed the sureties to receive, and discharge a bond to that amount which the government held, and on which they were sureties. They received the money and paid it into the treasury in discharge of the bond, which was given up, and it being afterwards discovered that this was the money of the collector, suit was brought against them to recover it back.

The principal reliance in that case, on the part of the government was, the act of Congress which gave the United States a *lien*

on all the property of the principal, and that the money deposited in bank being their's, could not be applied in exoneration of the sureties. That portion of the decision which relates to the *lien* of the United States, has no application whatever. After disposing of that question the judgment of the court was founded on the familiar principle of the right of a debtor to direct in what manner a payment shall be applied—that the principal in the bond having expressly directed that this money should be applied in payment of this particular bond, such direction was binding on the creditor, and discharged the obligation as to the principal, and by necessary consequence as to the sureties also, as their obligation could not be extended beyond that of their principal. It is quite obvious that the point decided in that case has no application whatever here. To discharge the sureties from liability on this bond, they must show either that they have paid, or are liable to pay on judgments recovered against them as sureties of the sheriff an amount equal to the penalty of the bond.

Let the judgment be reversed and the cause remanded.

BLAIR v. RHODES.

1. B was summoned as a garnishee alleged to be the debtor of H, against whom R had recovered a judgment; B answered that he was indebted to H in the sum of eight hundred dollars, from one to two hundred of which was dischargeable in saddlery: *Held*, that the plaintiff was not entitled to an *unconditional* judgment against the garnishee for eight hundred dollars. *Quere:* could the court have delayed proceedings to afford the garnishee an opportunity to deliver the saddlery according to his contract: or could the entire debt have been condemned with the reservation of B's right to deliver the saddlery to the sheriff, and *pro tanto* discharge the judgment.
2. An affidavit made for the purpose of obtaining a garnishment consequent upon a judgment, will not be regarded on error as conclusive that there was a judgment against the creditor of the garnishee; the existence of such judgment must be shown by the record of the suit against the original parties; or by its recital in the judgment rendered against the garnishee.

WRIT of error to the Circuit Court of Mobile.

This was a proceeding by garnishment under the statute, at the suit of the defendant in error against the plaintiff. The garnishee was alleged to be the debtor of Henry C. Holmes, against whom the plaintiff had obtained a judgment, for the sum of twenty-eight hundred and five 29-100 dollars, in the circuit court of Mobile, which was still unsatisfied. The garnishee on the 14th November, 1842, appeared and answered on oath, that at the time he was served with the garnishment, he was under a contract by lease with the defendant, to pay him eight hundred dollars, for rent, for the year commencing November 1, 1841, and ending November 1, 1842; two hundred dollars of which sum was to be paid at the end of each quarter, with the understanding that the defendant should receive saddlery amounting in value from one to two hundred dollars, in part payment of his indebtedness. *Further*, no part of the rent has been paid in any manner. The garnishment was issued on the 31st January, 1842, and executed on the same day. A judgment was rendered against the garnishee for eight hundred dollars.

G. Goldthwaite, for the plaintiff in error. The answer of the garnishee does not sustain the judgment, nor is the judgment authorized by any thing found in the record. *Further*, it is not shown that a judgment was rendered against Holmes, as stated in the garnishment, or affidavit on which it was founded. [He cited Aik. Dig, 213–4; 1 Ala. Rep. N. S. 421; 3 Ala. Rep. N. S. 114.]

No counsel appeared for the defendant.

COLLIER, C. J.—In Smith v. Chapman and brother, [6 Porter's Rep. 365,] the garnishee admitted that he was indebted to the defendant in attachment one hundred and nine dollars, *to be paid in store accounts*: The court held, that the answer did not authorize a judgment for that sum. [See also, Mims v. Parker & Coffman, 1 Ala. Rep. 421; Allen v. Morgan, 1 Stewart's Rep. 9; Presnell v. Mabry, 3 Porter's Rep. 165.] In the case before us, the garnishee admitted that he was indebted to the defendant in the judgment, in the sum of eight hundred dollars; from one to two hundred dollars of which he was, by his contract, to pay in saddlery, if he thought proper. The plaintiff

might, had he so elected, have relinquished his claim to so much of the debt as was dischargeable in saddlery, and have taken judgment for the residue, but he could not, according to the cases cited, have insisted upon unconditional judgment on the answer for eight hundred dollars; because it did not admit a monied indebtedness for so much. Whether it would have been competent for the court to have delayed the proceedings, to afford the garnishee an opportunity to pay the merchandize to the extent that his contract authorized; or whether the entire debt should have been condemned, with the reservation that the garnishee might deliver the saddlery to the sheriff, and that his indebtedness should be *pro tanto* discharged, are questions, which as they have not been discussed, we will not undertake to determine. [See 22d section of act of 1833, "concerning attachments." Aik. Dig. 43.]

In respect to the objection, that it does not appear from the record that the plaintiff had recovered a judgment against the creditor of the garnishee, it is for the first time made in this court. The remedy for the collection of debts by the means of garnishment, is given by statute, as well to a creditor who sues by attachment, as to him who has recovered a judgment. In the former case it is but a mode of levying the attachment; in the latter it becomes, if the expression be allowable, a consequential suit, in which the plaintiff seeks to render some third person liable to the payment of his judgment, either in whole or in part, because of his supposed indebtedness, &c. to the defendant. When the garnishment issues upon a judgment, the plaintiff is required to make affidavit (if an execution has not been returned "no property found,") that the defendant has no property within affiant's knowledge in his possession, and that he hath just reason to believe that another person (naming him) is indebted to the defendant, or hath effects of defendant in his hands. Upon the garnishee being summoned, it is declared that the court "shall examine and proceed against such garnishee or garnishees, in the same manner required by law against garnishees in original attachments." [Aik. Dig. 213–4.] It is perfectly clear that the plaintiff is not entitled to a garnishment in a case like the present, unless he has obtained a judgment against the defendant. This being conceded, is it not necessary, in order to authorize the action of the court against the garnishee that the judgment should have been shewn?

And how can it be known that this was done, unless the record discovers the fact? The affidavit made by the plaintiff is merely intended to authorize the issuance of the garnishment, but is no evidence that the state of the record is such as it affirms it to be. It cannot be received to establish any fact, but that the plaintiff had taken the pre-requisite step to give jurisdiction to the court. The fact that the judgment was rendered in the court to which the garnishee was summoned, will not supersede the necessity of proving its existence any more than if it had been recovered in another court. It must be regarded as a record, proveable either by the production of the original or a copy.

The most technical, and hence the proper mode of entering a judgment against the garnishee would be to recite therein that it appeared to the court that the plaintiff had recovered a judgment against the defendant, stating the time when, and its amount. We will not undertake to say that such a recital is indispensable, for we are inclined to think that as the proceeding against the garnishee is merely consequential, the record of the original suit might be sent up on error, and would show the fact of the judgment if it existed. But that it should be shown in some way by the record, we are entirely satisfied. [See Gaines v. Beirne & McMahon, 3 Ala. Rep. N. S. 114.]

If this were the only objection, we should award a *certiorari* to bring up the record of the principal case, if desired; but upon the first point considered, the judgment must be reversed and the cause remanded.

BINGHAM v. SMITH.

1. A debt in suit in Coosa county, cannot be attached by a creditor of the plaintiff in the circuit court of Tuscaloosa, the defendant in attachment controverting the justice of the demand.
2. *Quere*, whether a debt in suit can be attached in any other court than the one in which it is depending.

Error to the Circuit Court of Tuskaloosa.

COCHRAN, for plaintiff in error.

PECK and MOODY, *contra.*

ORMOND, J.—This case is in all respects like the case just decided of Bingham v. Rushing, except that in this, the garnishee in his answer, admits that he has not paid the call of the President and Directors, for the instalment of twenty-five per cent, for which he states the President and Directors of the company have commenced a suit against him in the circuit court of Coosa county, "which said suit is still pending and undetermined; that said garnishee is defending said suit, and has been advised by counsel and verily believes that said company have no legal right to make such demand and to sustain said suit."

Can a garnishment be sustained for a debt in suit, under the circumstances here detailed.

In England, a debt in suit in the courts of Westminster, cannot be attached by the custom of London, which is the foundation and original of our proceeding by attachment. [Cro. Eliz. 63, Sir John Perot's case,] nor can a judgment in the King's superior courts be attached, [2 Bac. Ab. 260, H.] In McCarty v. Emlin, [2 Yeates' Rep. 190,] the Supreme Court of Pennsylvania denied that this law was applicable to this country, and that the reason of the decision in England, was that the proceeding under the custom was confined to the inferior courts, and that they could not interfere with a proceeding depending in the King's Superior Courts. But in Wallace v. McConnell, [13 Peters' 136,] it was held, that a debt in suit in a court of the United States, could not be attached in a State court, upon the ground that it would lead to a conflict of jurisdiction, and that the court which first obtained jurisdiction would keep it.

In the case of Tucker v. McGee, [2 Ala. 253,] this court held that money collected by a sheriff, under execution, could not be attached in his hands, upon the ground that it was in the custody of the law; but in Hitt v. Lacey, [3 Ala. 104,] we held that a debt in suit could be attached in the same court in which the suit was pending, upon the ground, that as the suit brought by the defendant in attachment against his debtor, and the attachment against him were both prosecuted in the same court, no conflict of jurisdiction, could by possibility arise. It is also to be

observed that in that case, there was no controversy as to the debt prosecuted by the defendant in attachment.

In this case, not only is the debt which the corporation is endeavoring to enforce, controverted by the defendant, but it is depending in another court whose jurisdiction cannot be ousted by the institution of this proceeding. If the plaintiff could not be permitted, upon this garnishment to litigate the question of the indebtness of the defendant to the corporation, the result would not be binding on the corporation, who are no parties to this proceeding. If, therefore, it could be permitted to attach a debt in suit in any other court, than the one in which the suit is pending, it must be in a case, where the indebtedness is not controverted.

In the case of Cook's adm'r v. Field, [3 Ala. 54,] we held that a judgment against a garnishee, was no defence against the original creditor, unless the judgment was satisfied by the garnishee. It follows necessarily, that the garnishee could not plead the pendency of this suit in bar of the further progress of the suit instituted against him in another court for the same debt, by the corporation, and the result might be, that in one proceeding he might be found indebted to the corporation, and in the other not to be indebted.

For these reasons, we are entirely satisfied, that both on principle and authority, this proceeding cannot be sustained, and the judgment of the court below is therefore affirmed.

CLOUD v. GOLIGHTLY'S ADM'R.

1. It is not necessary that a foreign executor or administrator suing in our courts, should negative by his declaration, that the deceased had a known place of residence in this State, at the time of his death, or that his estate within the same had been committed to a domestic representative. *It seems*, that if the executor or administrator appointed abroad, is not authorised to maintain an action here, the ground of disability should be pleaded in abatement.
2. The court in which the foreign executor or administrator sues, may of its own motion require the production of the letters testamentary, &c.; and should, where its production is insisted on by the defendant, require it before judgment. But

the omission of the record to show whether such a requisition had been made, or insisted on, is not an error affecting the regularity of the proceedings.

3. An irregularity in the issuing of an execution, does not warrant the reversal of the judgment; if unauthorised by the judgment, or defective, or not legally enforceable, its action may be arrested by some direct proceeding.

WRIT of Error to the County Court of Russell.

The defendant in error, declared against the plaintiff as the indorser of a promissory note, made to his intestate. The declaration is in the usual form, but concludes with the profert of letters of administration, granted to the plaintiff below by the inferior court of the county of Muscogee, in the State of Georga, when sitting for ordinary purposes. It is stated in the judgment entry, that the defendant demurred to the declaration, and that his demurrer was overruled; also, that an issue of fact was tried and a verdict returned for the plaintiff on which judgment was rendered. The transcript also contains the copy of an execution issued on the judgment.

HEYDENFELDT, for the plaintiff in error, made the following points. 1. To entitle a foreign executor or administrator to sue in our courts, the statute requires that the deceased should have had no known place of residence in this State, and no appointment of a representative should have been made within the same; these facts should be averred in the declaration. 2. The record should show that the letters of administration were produced in court before the judgment was rendered. 3. The bond required by statute should also appear to have been executed before the execution issued, and the matters made essential, appear to have been done.

BELSER, for the defendant.

COLLIER, C. J.—By the act of 1821, it is enacted that "when letters testamentary, probate of a will, or letters of administration on the estate of any testator or intestate, having no known place of residence in this State, at the time of his or her death, shall have been duly obtained in any other State, territory, or country, and no personal representative of such testator or in-

testate, shall have been duly appointed and qualified in this State, the personal representative, or representatives so appointed out of this State, may maintain any action, demand and receive any debt, and shall be entitled to all the rights and privileges which he, she or they, could have done, or would have had, if duly appointed, and qualified within the same. *It is however provided*, that before the rendition of judgment in any such action, there shall be produced in court a copy of the letters testamentary, probate or letters of administration authenticated according to the laws of the United States, and the certificate of the clerk of some county court in this State, that the same has been duly recorded in his office; "and in default of such proof, the court may direct a non-suit to be entered.". *And further*, such foreign representative shall not be entitled to receive any money so recovered, or due to him in such right, until the evidence of his legal authority shall be recorded as by the first proviso required, and there shall have been deposited in the office of the clerk of the county court of the county where such judgment shall have been recovered, or of the county in which the debtor or debtors may reside, and bond in such penalty as the judge of the county court may direct, payable to himself and his successors in office, with such sureties as he may approve, conditioned, that such representative shall faithfully administer and apply, according to law, all monies and effects received by him in right of his testator or intestate from any person in this State. We have recited the section thus at length, because it is necessary to an understanding of the points raised by the assignment of errors. These we will consider in the order in which they are made by the plaintiff in error.

1. We do not think it necessary for the foreign representative to allege in his declaration every fact which is necessary to entitle him to sue in the courts of this State. If he were required to prove them when there was no plea putting them directly in issue, the privilege conferred by the act, would be charged with such inconvenient burthens, as to be almost valueless. Few would be inclined to avail themselves of it, when by obtaining letters testamentary, or of administration, from an Orphans' court within the State, they could prosecute suits without the hindrances which the statute thus interpreted would impose. The correct practice, doubtless is, to require the defendant, if he denies the right of the foreign representative to maintain his action, to plead in abate-

ment, the existence of those facts which are fatal to the remedy, viz: that the deceased had a known place of residence in this State, at the time of his death, or that his estate within the same had been committed to a personal representative. These pleas would of course allege affirmatively the place of his residence, or the court that granted letters testamentary, or of administration, so that there could be no difficulty in proving or disproving their truth.

If the plaintiff were required to negative, by averments, the existence of those facts, could a plea in bar be so framed as to throw on him the burthen of proving them? If not, what valuable purpose would be subserved by thus declaring? The estate of the deceased or the rights of domestic creditors, would not be better protected. To hold such proof to be necessary in order to make out the plaintiff's right of action, would not, it is true, be to require an impossibility, but would be an imposition profitless to any one, and most probably quite expensive. The manner of pleading then, should be such as we have indicated would be proper.

2. The court, it is true, may of its own motion, require the production of the letters testamentary, &c., and if they are not produced, direct a non-suit to be entered; yet we apprehend that this is not an imperative duty, and the mere neglect to enforce it is not available on error. If the defendant had appeared in court and insisted that the plaintiff should entitle himself to judgment by producing the evidence of his representative character, then the court would have been bound to act, and its refusal would have been fatal to the judgment. But no such course was taken in the present case. And is the mere silence of the record, evidence conclusive to show, that the plaintiff's right to sue was not shown to the court, even conceding that it should have been required without a motion on the part of the defendant? The view we take of the case makes it unnecessary to answer this question.

3. The last point made does not arise upon the record. The writ of error complains of legal defects in the judgment, and any irregularity in the issuing of execution cannot authorise its reversal. If the execution is unauthorised by the judgment, or is otherwise defective, or is not legally enforceable, the remedies are ample, by which its action may be arrested.

The view we have taken of the statute, is entirely conformable to the practice under it, from the period of its enactment to the present time; and we have only to add, that the judgment of the county court is affirmed.

WETUMPKA & COOSA RAIL ROAD COMPANY, v. BINGHAM.

1. An appeal bond from the judgment of a justice of the peace, which does not show that the judgment was rendered against the defendant, what was the amount of the judgment, or to what court the appeal was taken, is a nullity, and will not authorise a judgment to be rendered against the sureties, though the defendant to the judgment may voluntarily appear, and judgment be rendered against him.
2. A bill drawn by the President of a Rail Road Company on the treasurer of the Company, payable on demand, is, when dishonored, properly sued on as a bill of exchange, and to recover on it in a suit against the company, presentment for payment, and notice of the dishonor must be proved, or an excuse for failing to do so, shewn.
3. In such a case, if it be doubtful from the face of the bill, whether it was drawn by one in his private character, or as agent of the corporation, and by its authority, parol evidence is admissible to show the true nature of the transaction.
4. If a corporation is empowered by an amendment to its charter, to draw bills of exchange, and afterwards draws a bill; an acceptance of the amended charter will be presumed without showing any direct act of acceptance by the corporation or its authorised agents.
5. A consolidation of several appeals for money demands, between the same parties, will authorise the court to render a judgment for the entire amount against the sureties in the several appeal bonds, if the same persons are sureties in all the bonds.

Error to the circuit court of Autauga.

This proceeding consisted of eight cases, originally commenced by the defendant in error, before a justice of the peace, against the company, to recover the amount of a draft of the following tenor.

Wetumpka and Coosa Rail Road,
President's Office, April 30, 1838.

Dr. A. Crenshaw—Sir, On demand, pay William R. Bingham, or bearer, forty-five dollars, value received, and charge to account of your,

Obedient servant,

J. D. Williams, Pres't.

To A. Crenshaw, Treasurer.

The justice having rendered judgments against the company, the latter appealed, when the cases were sent up with the following bond in each case.

The State of Alabama, Autauga county. } Appeal to Circuit Court.

Know all men by these presents, that we, E. Burrows, J. W. Pryor and L. P. Saxon, are held and firmly bound unto William R. Bingham, his heirs and assigns, in the sum of ninety-six dollars, for the true payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents: signed, sealed and dated 11th July, 1838.

The condition of the above obligation is such, that whereas, William R. Bingham, hath instituted a suit against the President, Directors and Company before James H. Gorman, a justice of the peace of said county; and whereas, judgment hath been rendered upon the said suit against the said President, Directors and Company; and whereas, the said President, Directors and Company, are desirous of entering an appeal in said suit. Now, if the said President, Directors and Company shall prosecute said appeal with effect, and in case he be cast therein, shall pay and satisfy the condemnation of the court, then the above obligation to be void, else to remain in full force.

Signed, sealed and delivered in the presence of

J. H. Gorman, J. P.

E. Burrows, (seal.)
J. W. Pryor, (seal.)
L. P. Saxon, (seal.)

The eight cases were consolidated by consent, and a declaration filed against the company in the usual form, as in cases of inland bills of exchange for non-acceptance, to which the defendant demurred, and which was overruled by the court.

Upon the trial of the issue before the jury, the plaintiff read the orders drawn in favor of the plaintiff, on the face of which was indorsed, "noted for non-acceptance, May 10th 1838; J. H. Gorman, J. P." It was also proved by one Beecher, that at the time these drafts were drawn, he was the secretary of the Rail Road Company; that at the same time, J. D. Williams, was its president, and A. Crenshaw its treasurer. A resolution from the records of the company was also read, passed by the board of directors, by which the account of the plaintiff, against the company, was allowed as just, and the president directed to give drafts for the amount to the plaintiff on the treasurer.

The defendant objected to the reading of the drafts to the jury, unless it was shown that an amendment, which had been made to the charter, on the 9th January, 1836, had been accepted by the company. And also, because there was no proof that the drafts had been presented to Crenshaw, and Williams notified of his refusal to accept; and further, because these drafts did not purport to be the debts of the company, but the individual debts of Williams, and if the contracts of the company, are not bills of exchange.

The court overruled all these objections, and the jury rendered a verdict for the plaintiff. The sureties to the appeal bonds then objected to a judgment being rendered against them. 1. Because the bonds are not the bonds of the Rail Roard Company. 2. Because the order to consolidate the suits did not consolidate the bonds. 3. Because the bonds are void for uncertainty. The court overruled these objections and rendered judgment against the Rail Road Company, and the sureties to the appeal bonds, to all which the defendants excepted.

The errors assigned are the matters set forth in the bill of exceptions, and the rendition of judgment against the sureties in the appeal bonds.

Pryor, for plaintiff in error, contended that the demurrer to the declaration should have been sustained, because there was no express grant of power in the original charter to draw bills of exchange, nor was such a power necessary to enable it to fulfil the purpose of its creation. [2 Kent's Com. 298; 3 Wend. 573; 3 B. and A. 1; 5 Cow. 560; 10 B. and C. 128; 8 G. and J. 248.]

The declaration is bad. 1st, because it does not contain an aver-

ment that the president was authorised to draw bills for the company. 2. The bill declared on is not the bill of the company, but of J. D. Williams the drawer. 3. If the bill is the bill of the company, it is drawn upon itself, and is in effect, a promissory note, and should have been declared on according to its legal effect; [10 B. and C. 128.] 4. The declaration does not aver a presentment to the drawee before suit brought. 5. Damages is a penalty, and no officer or agent of a corporation can do any act which will subject it to a penalty; [13 Pick. 291.]

If the plaintiff intended to rely on the amended charter, authorizing the company to draw bills, he should have proved its acceptance by the company. [9 G. and J. 365.]

The testimony of Beecher, if it proved any thing, showed that these were not bills of exchange, but that it was merely a mode of liquidating the account. [2 Greenleaf, 121.]

The order of consolidation, did not work a consolidation of the bonds. The consent to consolidate could affect those only who were in court at the time, but the sureties to the bonds were not parties at that time. The consolidation made a material alteration in the contract of the sureties, and therefore discharged them. [4 W. C. C. R. 26; 15 Peters' 187.]

The bonds were void for patent ambiguities, and no judgment could be rendered upon them. It does not appear when judgment was rendered—for what amount—against whom—or to what court the appeal was taken.

If judgment could be rendered against the company, it could not against the sureties, as they are not by the bond, or in any other manner, connected with the proceedings.

W. Cochran, *contra.* The proof shows that the bills were drawn to pay a debt of the company by order of the directors, which fact it was competent for the plaintiff to show by proof *aliunde.* [2 Ala. Rep. 718.] But the amended charter expressly authorised the company to draw bills, and if it has exercised this power, it will be presumed to be under the charter as amended.

Great indulgence has always been shown by this court to proceedings before a justice of the peace, and as the company appeared in the court below, it is too late now to contend that these

bonds were not the bonds of the company, as in no other way could the cause get into the circuit court.

The consolidation of the suits produced no change in the contract of the sureties, but as it reduced the costs, was for their benefit.

ORMOND, J.—It is very clear, we think, that the judgment rendered against the sureties of the Rail Road Company, cannot be sustained.

The statute, [Aik. Dig. 260,] provides that a party against whom a judgment is rendered by a justice of the peace, may prosecute an appeal to the circuit court, upon giving bond with surety, and that if the judgment of the justice is affirmed, judgment shall be entered against the surety, as well as the principal, and execution issue against both or either.

The Rail Road Company having appeared and pleaded in the circuit court, may be considered as having waived the question of jurisdiction, and admitted that it was rightfully in court, but this waiver could only extend to those who were then parties in court. The right to render judgment against the sureties, though a consequence of the judgment against the principal, is derived solely from the appeal bond, which when sent up by the justice, is by the statute made *prima facie* evidence of the facts stated in it, and that the persons whose names are signed to it, did in fact execute it as their bond. Upon this evidence the court acts summarily and renders judgment against them jointly, with the principal. But it is too clear for argument, that the court must have at least *prima facie* authority for rendering a judgment against persons who have no opportunity of making defence. The court must have at least the *ex parte* evidence afforded by the production of a bond; that they have consented that if a certain judgment is affirmed against their principal, it may be also rendered against them. But the appeal bond, which the court acted on, does not show that any judgment was ever rendered against this corporation; or, if one was ever rendered against any one, what was its amount, or to what court the appeal was taken. As an appeal bond therefore, this paper was an absolute nullity, and could not authorize the rendition of a judgment against them. The judgment must be for this cause, reversed and remanded. It is, however, pro-

per, that the other important questions made in the cause, should be considered as a guide for the future decision of the cause.

The counsel for the plaintiff in error, contended that under the charter, as originally granted, the company had not power to draw bills of exchange, and although he conceded that the power was given by the amendment to the charter, yet he insisted that it must be shown that the corporation had accepted it.

Waiving the enquiry whether a legislative grant enlarging the power of the corporation, and increasing its facilities for the transaction of business, must not be presumed to be made at the instance of the corporation, we think the exercise of the power by the corporation, is conclusive to show that the grant was accepted. The exercise of any corporate function absolutely granted to the corporation by law is when done, referred to the charter of incorporation for its support and sanction, and we are unable to perceive any difference in a grant of power in an original or amended charter. In either case, as the exercise of the power is justified by the charter authorising the act to be done, the corporation is estopped from denying its power to do the act.

In the United States v. Dandridge, [12 Wheaton, 64,] the court say, "in relation to the question of the acceptance of a particular charter by an existing corporation, or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred. It is not indispensable to show a written instrument or note of acceptance on the corporation books. It may be inferred from other facts which demonstrate that it must have been accepted." [See also the King v. Amory, 1 Term, 588.]

The case of Randolph v. Parish, [9 Porter, 76,] is conclusive to shew that an instrument circumstanced like the present, may be declared on as a bill of exchange, although after acceptance, it might have been treated as a promissory note. The short statement which in appeals from justices of the peace, is received in lieu of a declaration, alleges that the bill was presented for acceptance to the drawee, who refused to accept or pay the same. The bill was payable on demand, and there was therefore no necessity or propriety in a presentment for acceptance. But as technical accuracy has never been required in the pleadings in such cases as the present, the averment may be considered as a

refusal to pay the bill on presentment. It was however necessary to prove the fact of presentment, and refusal to pay the bill, and notice to the drawer, or as an excuse for not doing so, that there were no funds in the hands of the drawee, which as we understand the bill of exceptions, the court ruled to be unnecessary.

The objection that the bill appears on its face, to have been drawn by Williams, individually, and that extrinsic proof was inadmissible to prove that it was drawn by him, as the agent of the company, and was so received by the holder, is untenable. There are clear indications on the bill itself that it was not drawn by Williams, in his private character, but as president of the company, and it was certainly competent for the plaintiff to prove that fact, and that he was authorised by the company thus to charge it. Mechanics Bank of Alexandria v. Bank of Washington, [5 Wheaton, 326;] and Lazarus v. Shearer, [2 Ala. 718,] where this precise point was thus ruled in a case where the indications that the bill was accepted for another, were not near so strong as is this case.

We can perceive no objection whatever to the consolidation of these suits, as it regards the sureties, the same being assented to by the parties in court. It did not in the slightest degree affect their contract, the same persons being sureties in all the cases. The effect of the consolidation was, that if a judgment was obtained against their principal a judgment would be enterred against them for the entire amount for which they were responsible in one judgment, instead of several judgments for the several amounts, which added together, comprise the sum for which they were bound. The whole effect is, without in the slightest degree varying or increasing their responsibility, to diminish the amount of cost, for which they would otherwise be liable.

Let the judgment be reversed, and the cause remanded.

McDONALD v. FOSTER & EASTON.

1. Where the mortgagor of personal property has such an interest therein, as may be sold under an execution for the payment of his debts, the mortgagee cannot on the trial of the right of property, upon a claim interposed by him under the statute, introduce proof to show what was the value of the mortgagor's interest, and that it was less than the value of the property in question.

Writ of Error to the circuit court of Barbour.

This was a trial of the right of property under the statute. The defendants in error recovered a judgment against John McKay, in the county court of Barbour, and an execution issued thereon, was levied on sundry goods, wares and merchandize, which were claimed by the plaintiff, who gave bond with surety to try the right to the same. On the trial the claimant excepted to the ruling of the court. From the bill of exceptions, it appears that the claimant was a mortgagee of the defendant in execution, of the property in controversy, of a date prior to the execution; that the debt intended to be secured was equal to the value of the property. The question made, was whether this proof was admissible to show that the equity of redemption was of no value, or to abate the price at which it might be estimated by the jury. Whereupon the court decided, that the property being in possession of the defendant in execution at the time of the levy, and therefore subject to the levy, the mortgage was irrelevant and could not be introduced for either of the purposes proposed. A verdict was returned for the plaintiffs in execution, and judgment thereupon rendered, which ascertains the value of the property, and determines its liability to be sold under the execution.

Buford, for the plaintiff in error.
Belser, with whom was Harris, for the defendants.

COLLIER, C. J.—The bill of exceptions does not inform us what was the form of the mortgage attempted to be set up by the claimant; the stipulations, (if any) in respect to the possession of the property; whether the debt intended to be secured was past

due, and whether the mortgage contained a power of sale. All intendments on these points must be made most strongly against the party complaining of error, so as to sustain the judgment of the primary court. If the mortgagor was in possession of the merchandize, and entitled to enjoy it as against the mortgagee, it has been repeatedly held, that such an interest may be leived on and sold under execution. [McGregor & Darling v. Hall, 3 Stewart and P. Rep. 397; Purnell, et al. v. Hogan, 5 Stew't & P. Rep. 192; Perkins and Elliott v. Mayfield, 5 Porters' Rep. 182.] In Purnell, et al. v. Hogan, the court referring to McGregor & Darling v. Hall, say it has been expressly decided upon a view of all the authorities, that the interest of a mortgagee can not be interposed to prevent the execution of the property in possession of the mortgagor; and that the equity of redemption is liable to be sold in satisfaction of the mortgagor's debts. In that case the mortgagee was the claimant, and the court decided that the mortgage was admissible evidence in his favor for any purpose.

If the mortgagor has such an interest as may be sold on execution, the value of that interest cannot at law be shown to be less than the property. The statute requires that if the jury find the property subject to the execution, they shall find the value of each article separately. Here the jury have found against the claimant, and their duty would not be performed according to law, by ascertaining the value of each article, and deducting therefrom the amount of the claimant's lien.

Besides, the plaintiff in execution was entitled to have the interest of the mortgagor, be it what it might, levied on and sold, and the mortgagee by interposing a claim, cannot impair his rights. A court of law cannot, consistently with its powers, compel a plaintiff in execution to accept the value of the mortgaged property after satisfying the lien of the mortgagee instead of offering it for sale. If the mortgagor have a legal interest, the thing itself may be sold, and this will not prejudice the mortgagee, who may assert his rights in the same manner as if no sale had taken place. See further, Planters' and Merchants' Bank v. A. Willis & Co., at this term.

The consequence is, the judgment of the circuit court is correct and must be affirmed.

THE STATE v. JONES.

1. The 6th and 7th sections of the 3d chapter of the penal code, do not create an offence unknown to the common law, or increase the punishment of a common law offence; the offences therefore, described in those sections may be proceeded against, and punished upon an indictment for murder at common law.
2. When there is one good count in an indictment, the verdict and judgment will not be disturbed.
3. The court may refuse to quash a count in an indictment, and such refusal cannot be assigned as error.
4. The court may in its discretion permit the prosecutor to elect on which of the counts he will proceed.
5. When a bill of exceptions is allowed in a criminal case, the facts embodied in it become a part of the record; and if a writ of error is allowed, it brings up the entire record, and error may be assigned on any part of it.
6. As the jury may find a general verdict, they are judges both of law and fact, and may, if they think proper to do so, disregard the opinion of the court upon the law.
7. The proper form of the oath to be administered to the jury, in a criminal case, is, that they shall "render a true verdict according to the evidence."

ERROR to the Circuit Court of Perry county.

The defendant was indicted in the circuit court of Perry county, for the murder of his own slave. The first count of the indictment, is in the usual form of an indictment at common law, charging the slave to be his property, and the death to have been caused by beating with clubs, sticks and whips.

The second count is as follows: "and the jurors aforesaid, upon their oaths aforesaid, do further present, that the said William H. Jones, on the day and year last aforesaid, with force and arms in the county aforesaid, in and upon a slave named Isabel, then and there belonging to him the said William H. Jones, in the peace of God, and our said State, then and there being, feloniously, wilfully and of his malice aforethought, an assault did make, and her the said Isabel did then and there feloniously, wilfully, and of his malice aforethought, cruelly, barbarously and inhumanly beat and whip, of which said beating and whipping the said Isabel, on the day and year last aforesaid, died. And so the jurors afore-

said, upon their oaths aforesaid, do say that the said William H. Jones, the said slave Isabel in manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the statute, and against the peace and dignity of the State of Alabama.

The third count is for an assault and battery, and cruel punishment.

From a bill of exceptions sealed by the presiding judge, at the instance of the accused, it appears that before the cause was put to the *venire*, the prisoner, by his counsel, moved the court to quash the indictment, on the ground that it contained a misjoinder of offences; and the court was of opinion that the indictment did contain a misjoinder of offences, but refused to quash the same, allowing the solicitor to elect on which of the counts he would proceed, who thereupon elected to proceed on the first and second counts, disregarding the third. To which opinion of the court, refusing to quash, and permitting the solicitor to elect on which of the counts he would proceed, the prisoner by his counsel excepted.

The proceedings upon the trial are thus stated: "On this day, which was appointed for the trial of this cause, at a previous day by order of the court, and consent of parties, came William M. Brooks, solicitor, who prosecutes for the State, and the defendant in proper person, and by his counsel; and it was made to appear to the satisfaction of the court, that the prisoner had been served with a list of the jurors, and a copy of the indictment, ten entire days previous; and the bill of indictment being read, the defendant pleaded thereto, 'not guilty,' and thereupon came a jury, &c., who being elected, tried and sworn, well and truly to try, and a true deliverance to make between the State and the prisoner, and a true verdict to render according to the evidence, upon their oaths, do say, 'we, the jury find the prisoner guilty of murder in the second degree;' and thereupon the prisoner was remanded to jail to await the sentence of the court."

And at a subsequent day, the prisoner having answered that he had nothing to say why sentence should not be pronounced according to law, the court sentenced him to be confined in the penitentiary for ten years.

The assignments of error are,

1. The two counts of the indictment for murder are defective

in not conforming to the 7th section of the 3d chapter of the penal code.

2. There is a general verdict upon a misjoinder of offences.

3. There is a misjoinder of offences and a general verdict.

4. The court erred in permitting the solicitor to elect on two counts, charging different offences, punishable differently.

5. The prisoner was not arraigned before pleading to the indictment.

6. The record does not shew that the prisoner was present when the jury rendered their verdict.

7. The jury should have been sworn to render a true verdict according to law and the evidence.

8. The oath administered was not the one prescribed by the statute of 9th January, 1841.

Bagby, Gayle and Downman, for the prisoner, contended, that by the 7th section of the 3 chapter of the penal code, the legislature had created a new offence; that an indictment for that offence should set out the exceptions, as that in fact constituted the crime. That therefore, the first count and second count were both bad. That if the first count was good, the second was clearly bad. That if the counts were both good, the first being at common law, and the second under the statute, and the judgment and punishment being different, there was a misjoinder of offences, and the verdict being general, cannot be sustained. [1 Chitty's Crim. Law. 282; 2 Pick. 141; Nott & McCord, 365.]

That the bill of exceptions would not be looked to by the court, because it presents a point which cannot be raised here; but at all events will be disregarded as to the election permitted by the court; and there is then evidently a misjoinder of offences. [5 Porter, 32; 3 Greenleaf 219, 183; 4 Pick. 302; 15 Wend. 281; 8 Johns. 495; 5 ib. 467; 2 Caine's 169; 8 East, 280; 2 Dall. 422; 2 Binney, 168; 1 Bac. Ab. 529; 2 Brock. 75; 1 Wend. 418; 1 Pick. 37; 1 Leigh, 86.]

That the record should show that the indictment was read to the prisoner. [1 Ala. Rep. 655; 4 Black. Com. 323; 2 Hale 218.]

The record does not show that the prisoner was present when the verdict was rendered, except by argument or inference, and there can be no intendment against the prisoner.

That the jury are judges both of law and fact, in criminal ca-

ses, and were precluded from judging of the law by the form of the oath. That this right has never been questioned in England, except in trials for libel; and after a great struggle, the question was settled there in favor of the people, and has been expressly adopted into the constitution of most of the States of the Union; [3 Johns. Cases, 337; 10 Pick. 481; 18 Maine 346; 4 Black. 361.]

The Attorney General, *contra*. The act of the last legislature authorising a bill of exceptions in criminal cases, did not authorise the prisoner to do any thing more than to take an exception to the opinion of the court, and spread the facts upon the record, that the judges of the Supreme Court might be able, if they thought proper, to award a writ of error; and no other error can be assigned than is brought up by the bill of exceptions. A motion to quash an indictment is addressed to the discretion of the court below, and cannot be revised in this court, [3 M. & S. 549; 3 D. & E. 106.]

Where there is one good count to which the finding may be referred, the indictment will be sustained, [5 Porter, 32.]

ORMOND, J.—The first question to be considered is, what points are presented for revision by the writ of error. The Legislature, at its last session, authorised bills of exceptions to be taken by defendants in certain criminal cases, in the same manner as in civil cases. The counsel for the prisoner, contends that the court may disregard the bill which has been taken in this case, upon the ground that this court, if the court below had refused to seal the bill, would not have awarded a mandamus; while on the other hand, the Attorney General insists that this court can look to no other error than that assigned on the bill.

Previous to the passage of this law, no question of fact could be presented on the record, in a criminal case, for the revision of this court; unless the court below thought proper to refer it as a question of novelty and difficulty. The plain design of the Leislature was to give to defendants, in those criminal cases embraced by the statute, the right to put any question of fact upon the record, to enable them to apply to this court for a writ of error. The writ of error, when granted, applies to, and brings up the entire record, and error may therefore be assigned upon any part of it. When a bill of exceptions is allowed, either in a civil or

criminal case, the facts there embodied become a part of the record, and cannot be waived by either party, or disregarded by this court.

The three first assignments of error suppose a misjoinder of offences in the two first counts of the indictment, and that, as the verdict was general, no judgment can be rendered upon it. The first count in the indictment is a count at common law, for the murder of the slave, to which no objection has been urged. The second appears to have been framed on the 7th section of the 3d chapter of the penal code, which declares that an owner of a slave, causing his death by whipping, &c., though without intention to kill, unless in self-defence, or in the use of so much force as is necessary to procure obedience from the slave, shall be deemed guilty of murder in the second degree.

There is no difference in principle between the 7th and the preceding section; the first embracing the case of an overseer, the latter that of an owner. These sections treat of the crime of murder committed on a slave; they do not create a mere offence, unknown to the common law; nor do they subject the offender to a greater punishment than was inflicted at common law; they are therefore not statute offences, and by necessary consequence, an indictment may be framed upon them at common law, as was held by this court at the present term, in the State v. Flanegin. Indeed the sections of the code we have been considering, merely promulgate rules of evidence, and are declaratory of the common law. It is therefore unnecessary to consider whether the second count be good or not, as the first count is unquestionably good, and that will sustain the judgment of the court, as was held by this court in the State v. Coleman, [5 Porter, 32,] and to the same effect might be cited numerous authorities in England and the United States.

The same case is also an authority to show that the court may refuse to quash an indictment, and put the party to his demurrer; and that a refusal to quash cannot be reviewed on error. It is equally as clear that the court may permit the solicitor to elect on which of the counts of the indictment he will proceed. Such election was made in this case, and the third count, which was for a misdemeanor, abandoned. This course, could not by possibility prejudice the prisoner, and is in accordance with the established practice at the present day. [Young v. The King,

3 D. & E. 106; Commonwealth v. Gillespie, 7 S. & R. 469; Burk v. The State, 2 H. & J. 426, Kane v. The People, 8 Wend. 211; 1 Chitty's Crim. Law, 249.]

The assignment that there was no arraignment of the prisoner is not sustained by the record. It there stated that "the bill of indictment being read the defendant pleaded thereto, not guilty, and thereupon came a jury, &c." It was supposed the indictment might have been read for the information of the bystanders or read to the jury, and that afterwards the defendant was called on to plead; but it appears that the jury were not empannelled when the indictment was read, and it would be absurd to suppose that the indictment was read to persons having no interest whatever in it. But there is here no room for conjecture. The indictment being read, the defendant pleaded thereto "not guilty," is the language of the record, which is a clear and perspicuous statement of the arraingment of the prisoner.

Nor is there any force in the objection that it does not appear that the prisoner was present when the jury rendered their verdict. In the State v. Hughes, [2 Ala. Rep. 102,] it appeared that the prisoner was not present when the verdict was rendered, and for that cause he moved in arrest of judgment; and this court held it error and reversed the judgment. In this case, we think it does sufficiently appear that the prisoner was present when the verdict was rendered. The record, after reciting the rendition of the verdict, proceeds to state "and thereupon the prisoner was remanded to jail to receive the sentence of the court." According to all rules of fair interpretation and just criticism, we must understand from this, that the prisoner was in court when the jury rendered their verdict. The words "and thereupon," connects the prisoner with the rendition of the verdict, and shows that he was present. We cannot presume, as we are asked to do, by the counsel, that the prisoner, having been bailed previous to his trial, was permitted by the court to leave the bar, while the jury were deliberating on their verdict, in a case involving a capital felony. He might, it is true, have been remanded to jail whilst the jury were considering of their verdict, but if that was done, it appears he was again remanded to jail, language which cannot be true, if he was not brought from the jail to hear the verdict pronounced. In addition, it may be added that when called on to say whether he had any thing to object to the sentence being pronounced, he

answered, "nothing." The record is a narative of what took place at the trial; in construing it we apply to it those rules of interpretation which govern all written instruments. It is to be construed according to its plain and obvious import, and not by those rules which would make it necessary that it should state those facts it purports to detail, with so much precision and certainty as to exclude every other conclusion.

It remains but to enquire whether the proper oath was administered to the jury. They were sworn "a true verdict to render according to the evidence;" and it is insisted they should have been sworn a true verdict to render according *to the law and* evidence. In the examination of this question, the counsel for the prisoner have gone into an able and elaborate argument to show, that in criminal cases, the jury are judges both of law and fact; but the true question appears to be whether by the form in which the oath was administered the jury were deprived of the power of determining the law.

The power of the jury to judge both of law and fact, results necessarily from the very constitution of that body, and from their right to find a general verdict for the prisoner, which the court cannot disturb. This right is explicitly admitted by Littleton & Coke, and other ancient writers upon the common law. [Coke Litt. 228, a.] So in 4 Black. Com. 361, it is laid down that if the jury doubt the matter of law, they may choose to find a special verdict; but have an unquestionable right to find a general verdict, and determine the law as well as the fact. At the same time it cannot be doubted that these sages of the law, considered it the duty of the jury, to receive the law from the court, and that it was at the "hazard of a breach of their oaths, when they undertook the decision of questions of law." [See also People v. Croswell, 3 Johns. Cases, 337.]

When the power of juries to find a general verdict, and consequently their right to determine, without appeal, both law and fact, is admitted, the abstract question whether it is, or is not their duty to receive the law from the court, becomes rather a question of casuistry or conscience, than one of law; nor can we think that any thing is gained in the administration of criminal justice, by urging the jury to disregard the opinion of the court upon the law of the case. It must, we think, be admitted, that the judge is better qualified to expound the law, from his previous

training, than the jury; and in practice, unless he manifests a wanton disregard of the rights of the prisoner, a circumstance which rarely happens in this age of the world, and in this country, his opinion of the law will be received by the jury as an authoritative exposition from their conviction of his superior knowledge of the subject.

This right of the jury is doubtless one of inestimable value, especially in those cases where it may be supposed the government has an interest in the conviction of the criminal; but in this country, when the government in all its branches, executive, legislative and judicial, is created by the people, and is in fact their servant, we are unable to perceive why the jury should be invited or urged to exercise this right contrary to their own convictions of their capacity to do so, without danger of mistake. It appears to us that it is sufficient that it is admitted that it is their peculiar province to determine facts, intents, and purposes; that it is their right to find a general verdict, and consequently that they must determine the law; and whether in the exercise of this right they will distrust the court as expounders of the law, or whether they will receive the law from the court, must be left to their own discretion, under the sanction of the oath they have taken.

We do not doubt that the oath administered in this case was the proper one. It is the oath which has been administered to juries, in criminal cases, from the earliest records of criminal trials, to the present day, both in England and the United States; and sitting here as we do, to expound and not to make or alter the law, we must consider this unbroken chain as authoritative testimony of what the law is. We entertain as little doubt that this form of administering the oath does not preclude the jury from determining both law and fact. When a juror is sworn, he is invested with the office of judge, and authorised to pronounce the law in the particular case he has to try, and does so when he renders his verdict, whether he abides by or disregards the opinion of the court. But it is said in argument that if he be a judge, like all other judges, he should be sworn faithfully to administer the law. The juror is one of the prisoner's peers, authorised and required by his oath to make a true deliverance between him and the State, and cannot be supposed to have any desire to oppress the prisoner, or to find him guilty against law, and there is therefore no reason to apprehend that he will convict him against law.

It is, however, impossible to entertain a serious doubt that the very form of the juror's oath binds him to decide the law correctly, precisely as it is obligatory on him to determine the facts truly.

The charge preferred by the State, is, that the prisoner, by an act done, has offended one of its laws. The law which he is charged to have offended, is certain, and the juror as judge must be presumed to know it; the guilt or innocence of the prisoner depends on the ascertainment of the fact, and if in passing on the guilt or innocence of the prisoner, the juror should intentionally misapply the law to the fact, he is as guilty of a violation of his oath as if he should falsely find the fact either for or against the prisoner.

The earnestness with which this point was pressed on the court, must be its excuse for examining, at some length, a question about which it is difficult to suppose any serious doubt could be entertained.

It remains but to add, that no error is shown upon the record, and that the judgment of the court below is therefore affirmed.

WELLBORN v. SHEPPARD.

1. A judgment by default, where no declaration has been filed, is irregular and cannot be supported.
2. A writing acknowledging the receipt of money of the plaintiff, and promising to account for the same on final settlement with him, is not such a writing within the statute, as authorises a judgment final by default.

WRIT of error to the Circuit Court of Barbour.

This was an action of *Assumpsit*, by the defendant in error, against the plaintiff, upon a writing as follows: "Received, Feb. 19th 1839, three hundred and twenty-five dollars 20-100, belonging to Edmund Sheppard, and for which I agree to account on a final settlement with him.

WM. WELLBORN.

A judgment final was rendered by default without a declaration, and it is now assigned for error. 1. That there is no declaration. 2. That the judgment was rendered without the intervention of a jury.

M. W. Lindsay, for the plaintiff in error.
No counsel appeared for the defendant.

COLLIER, C. J.—1. It has been repeatedly decided by this court, that a judgment by default, where no declaration has been filed, will not be sustained. This error is decisive of the case, but as it must be remanded, it is proper to express an opinion upon the second point raised.

2. The writing is not an absolute promise to pay the sum expressed on its face; but it is an acknowledgment that so much money was received, and a promise by the defendant to account to the plaintiff for it, on settlement. This implies that the parties had some transactions with each other, which were unsettled, and that when their dealings, accounts or demands were adjusted, or the balance ascertained, the money received by the defendant would be accounted for. No action could be brought on the paper, until the defendant was put in default, by refusing, *on demand*, to account, or by refusing to pay over to the plaintiff such balance as might be found due him on settlement. This being in our opinion, the proper interpretation of the writing, it is clear that it does not ascertain "the plaintiff's demand or sum sued for" within the provisions of the act of 1812, and consequently no judgment could be rendered for its amount and interest, without the intervention of a jury.

The judgment is reversed, and the cause remanded.

GIVENS v. ROBBINS & PAINTER.

1. When an action is commenced against three jointly, continued as to two, and judgment rendered against the third—the entire action is discontinued.
2. An application for the benefit of the bankrupt law by one against whom a suit is commenced, does not justify a continuance of the cause.

Error to the Circuit Court of Benton.

This was an action of *assumpsit*, on a promissory note, by the defendant in error against E. L. Givens, H. L. Givens and W. T. Givens as partners. After the commencement of the suit, E. L. & H. L. Givens applied for the benefit of the bankrupt law, and this fact being suggested to the court by them, and a continuance moved for, the court continued the cause as to them, though objected to by the plaintiff's counsel and refused to continue as to the other defendant.

A joint demurrer to the declaration, which had previously been filed, was then overruled, and W. T. Givens filed three pleas, *non est factum, non assumpsit*, and payment. Issue was taken on the second and third pleas, and a special replication to the first, to which the defendant demurred, and which was sustained by the court. The court permitted the plaintiff to reply again to the first plea, notwithstanding the objections of defendant's counsel. The error assigned is, that the cause was discontinued.

Rice, for the plaintiff in error, contended that after a joint plea by all the defendants a continuance of the cause as to two, and trial as to the third, was a discontinuance of the entire action. That the special replication of one defendant was a discontinuance. He further maintained that an application for the benefit of the bankrupt law did not confer on the debtor the right to suspend proceedings in an action against him until he obtained a decree in bankruptcy. He cited, 2 Tidd's Pr. 684; 3 Ch. Gen. Pr. 753; 15 Johns. Rep. 398; 2 Cowen's Rep. 512; 6 Com. Dig. 205, 271.

Moore, *contra*.

ORMOND, J.—According to our practice, the granting or refusing permission to continue a cause, is a matter of discretion with the court below, and cannot be reviewed in this court. We think it proper, however, to say, that we entertain no doubt that an application for the benefit of the bankrupt law, will not entitle a party who has been sued, to a continuance of his cause. The act of Congress does not contemplate that the party applying for the benefit of the act, shall be released from his debts until he obtains his discharge and certificate according to the rules prescribed in the 4th section of the law; and as it is altogether uncertain whether he may ever obtain his discharge, the mere application of the debtor, is no ground for delaying the creditor in the prosecution of his suit.

But, although for the reason given, the question of continuance, as such merely, cannot be reviewed in this court; yet, when made as to two out of three joint defendants, it becomes necessary to consider what are the consequences attending it, as it regards the other defendant.

At common law, a chasm in the proceedings by a neglect to continue the cause, or the omission in a plea, or replication, to answer the whole matter of the bar, or declaration was a discontinuance and defeated the action. So a discontinuance as to one defendant, is a discontinuance as to all. [6 Com. Dig. Pleader, w. 2, 3, 4; Tippet v. May, 1 B. & P. 411; Keeble v. Ford & Vining, at the last term.]

By the proceeding here, the continuity of the cause has been destroyed; the action, which at its commencement, was joint, has become several, and the consequence is, that it is discontinued. By statute in this State, a discontinuance is permitted against those on whom the process is not served, without producing this result. [Aik. Dig. 267.] But there is no statute authorising the course pursued in this case, and the judgment must therefore be reversed.

MURRAY v. CHARLES.

1. The clerk of a court is authorised by statute to receive of a defendant against whom a judgment is rendered by his court, the amount of the same; and this as well before as after an execution has issued.

WRIT of Error to the Circuit Court of Greene.

This was a motion to cause satisfaction of a judgment recovered by the plaintiff, against the defendant, to be entered of record and to quash the execution thereupon issued. The facts of the case are presented by a bill of exceptions, and are substantially as follows, viz: At the March Term, 1842, of the circuit court, the plaintiff recovered a judgment against the defendant, for one hundred and sixty nine 80-100 dollars, besides costs; after the court had adjourned and an execution had been made out, but before it was placed in the sheriff's hands, or had been taken from the clerk's office, the defendant paid to the *then* clerk of the court the amount of the judgment, with interest and costs, after deducting a credit to which he was entitled. After the payment thus made, the plaintiff procured an execution to be issued on the judgment and placed in the hands of the sheriff of Greene, to be levied of the goods, &c., of the defendant. Upon these facts, the court ordered the execution to be quashed, and satisfaction of the judgment to be entered, and thereupon the plaintiff excepted.

J. B. CLARK, for the plaintiff in error.
W. M. MURPHY and W. G. JONES, for the defendant.

COLLIER, C. J.—The only question presented in this case is, whether the clerk was authorised to receive the money due on the judgment so as to discharge the defendant from further liability. In Currie v. Thomas, [8 Porter's Rep. 293,] which was an action on a promissory note, the defendant pleaded that an action had been previously brought on the same note, and that he had paid the sum due thereon, to the clerk. The court held, that independent of an authority derived from a statute, money

cannot be lawfully paid to the clerk in vacation, or in any other manner than as the officer of the court in term time; and after noticing the legislative acts upon the subject, the conclusion is attained, that a payment made to him before judgment, will not discharge the debtor. In that case, the act of 1834, "to provide a more summary mode of collecting money from clerks" is cited, but as it was unnecessary, none of its provisions were particularly examined. The fifth section enacts, "that in all cases where money shall be paid to the clerk of any court, the party entitled to receive it shall have the same remedy for its recovery and the same damages for its detention, as are now provided, and allowed by law for money paid to clerks on execution, and it is hereby expressly made the duty of all clerks to receive and account for all such sums of money, as may be paid to them by either party as well after, as before the issuance of the execution." The latter part of this section seems to us very clearly to confer upon clerks the authority to receive money on judgments rendered in their courts. This is rendered more obvious, if possible, by the terms employed, which not only give the right, but injoin the receipt of the money as a duty, whether a collection had been required to be made by execution or not. The provision is too plain to admit of illustration—it fully authorised the action of the circuit court upon the defendant's motion, and the judgment is consequently affirmed.

CRAWFORD, ET AL. v. THE STATE BANK

1. A notice by the President and Directors of the Bank of the State of Alabama, with the seal of the corporation, is a sufficient compliance with the charter, which requires the notice to be given by the President of the Bank.

ERROR to the County Court of Tuskaloosa.

Judgment on motion by default in the court below, by the bank, against the plaintiffs in error.

The judgment entry recites, and then afterwards, at the term first aforesaid, came the Bank of the State of Alabama by its attorney, and produced in court here, a note of hand payable to the President and Directors of the Bank of the State of Alabama, in the following words and figures, to wit: Washington county, June 1st 1840: Twelve months after date, we, William Crawford as principal, and P. T. Harris and Samuel Frisbie, as securities, jointly and severally promise to pay the President and Directors of the Bank of the State of Alabama, or order, eight hundred and thirty dollars, negotiable and payable at the said Bank, with interest from the date, at the rate of eight per cent. per annum, for value received.

Wm. Crawford,
P. T. Harris,
Samuel Frisbie.

And the said attorney having produced the certificate of John Marrast, President of said bank, that the debt due in, and by the above described note, set out and described in said notice and here produced and identified to the court, is really *bona fide* the property of said bank, moved the court for judgment in favor of the President and Directors of the Bank of the State of Alabama, against the said William Crawford and Samuel Frisbie, for the sum of eight hundred and thirty dollars, with interest, at eight per cent. thereon, from the first of June, 1840; and it appearing to the satisfaction of the court, that the said William Crawford and Samuel Frisbie, have had notice of said motion, thirty days before the making of the same, by a notice under the seal of the President and Directors of the said bank; and it also appearing to the satisfaction of the court, that said debt is due and unpaid, and the sum of eight hundred and thirty dollars due thereon. It is therefore considered, &c.

The defendants prosecute this writ, and assign for error,

1. The notice was given by the corporation instead of the President of the bank.

2. It does not appear that the note on which the judgment was founded, was proved to have been executed by the defendants.

3. It does not appear on what day the judgment of the court was rendered.

4. It does not appear that the notice was given that a motion would be made on any particular day.

5. It does not appear from the record that the motion for judgment was made on the day the notice indicated it would be made.

B. F. PORTER, for the Bank.

ORMOND, J.—The first assignment of error is founded on the supposition, that the notice was given by the corporation, instead of having been given by the President of the Bank, as required by the charter. [Aik. Dig. 65, § 51.] The judgment recites that the notice was under the seal of the President and Directors of said Bank," and without intending to intimate that if the notice was required to be given by the corporation, this might not be sufficient, we think it very clear that the notice given in this case, is a compliance with the statute. It may be conceded that if the charter required the notice to be given by A, that one given by B, would not be sufficient; but in this case the notice is given by the President of the bank, and the fact that others joined with him in giving it, will not vitiate it.

All the other assignments of error are answered by the repeated decisions of this court, and especially by the cases of Curry v. The Bank, 8 Porter, 360; Clements and others, v. The Bank, 1 Ala. Rep. 50, and McRae v. Colclough, 2 ib. 74.

In regard to the objection that no day was mentioned in the notice, when the motion would be made, the fact appears to be otherwise from the judgement entry, but if the fact was as supposed, it was held in the case of McRae, previously cited from 2 Ala. Rep. 74, that it was not necessary that the day of the term should be designated on which the motion would be made. To prevent judgments on motion, from being taken improperly, this court adopted a rule, that the clerks of the circuit and county courts should enter all motions for judgments on a separate docket to be kept for that purpose.

There is no error in the judgment, and it is therefore affirmed.

RILEY v. MARSHALL, ET AL.

1. Where a coroner collects money under an execution which is afterwards quashed, before the money is paid over, the defendants cannot, by notice and motion, recover of the coroner, the amount thus collected and retained.
2. Several defendants, who have each paid for himself different amounts upon an execution against them, which is afterwards quashed, cannot unite in a suit to recover the amount paid, and obtain one judgment adjudging to each of them the sums they are respectively entitled to. Their rights are several, each are not interested in the entire judgment, and difficulties might arise in its enforcement by execution.

WRIT of Error to the Circuit court of Russell.

This was a proceeding by notice and motion, at the suit of the defendants in error against the plaintiff as coroner, for the recovery of money collected of them on sundry writs of *fieri facias*, issued from the Circuit court of Russell, which had been quashed by order of that court. The amount alleged to have been collected of Park is eight hundred and twenty-six dollars; of Marshall six hundred and five dollars; and of Stapler twenty-two hundred and thirty-seven dollars. Various proceedings were had in the case, and a judgment at length rendered upon verdict in favor of Park for five hundred and eighty-six dollars, of Marshall for six hundred and five dollars, and of Stapler for nineteen hundred and ninety-seven dollars. These several sums are all adjudged to the plaintiffs below by one judgment.

BELSER and HEYDENFELDT, for the plaintiff in error.

COLLIER, C. J.—We have no statute which authorizes the course of proceeding adopted in this case. Our legislative acts, which provide a summary remedy against officers for the failure to pay over money collected on execution, &c. contemplate the plaintiff in execution as the actor in the motion, except in some few cases, of which the case before us is not one. These acts we have always held were introductive of a new and extraordinary remedy unknown to the common law, and could not be extended

by construction so as to embrace other cases coming within their mischief, and in which the officer was chargeable with a breach of duty. In the present case the motion is made by the defendants in certain executions which the court had directed to be quashed; it is a *casus omissus* in our statutes, and should not have been entertained. It need not be considered whether the court could not afford some expeditious remedy, so as to render a resort to a suit unnecessary.

But if the jurisdiction of the Circuit court, in the manner in which it has been exercised were unquestionable, the judgment would be erroneous, because it adjudges distinct sums of money to be paid severally to each of the plaintiffs in the motion. Such a judgment in a court of law cannot be supported. An execution issued upon such a judgment would require not a joint sum to be collected, to which each and all the parties were entitled, but distinct amounts due them severally. If either of the plaintiffs in the judgment were to die, his interest would not be collectable by execution until his representative was made a party, and there could be no revival by associating an executor or administrator with the other plaintiffs. But this point is too plain to require explication; it need but be stated to show the irregularity of the judgment. Such a proceeding, if allowable by law, should have been at the suit of each of the plaintiffs, for the recovery of the sums collected of them respectively.

We have only to say, that the judgment of the Circuit court is reversed.

SHERROD v. RHODES.

1. An accommodation drawer is a surety, and entitled to notice, although he had no funds in the hands of the drawee.
2. In such a case the fact that the drawer was indebted to the acceptor, for whose use the bill was drawn, in a sum equal to the amount of the bill, will not dispense with notice of the dishonor of the bill, unless the bill was drawn in payment of the debt.

3. A bill being drawn by R, for the accommodation of an incorporated company, to enable it to raise money by its sale, and the bill not being paid at maturity, the treasurer of the company informed R of that fact, and that the holder threatened suit, but would take a good bill for the amount which he urged R to draw, as he was indebted to the company in about that sum. R, in his answer, after stating his resources, says, "It would afford me great pleasure to do as you wish, but I think from the above expose you will agree with me it would be improper to do it"—held, that this was not a waiver of notice of the dishonor of the bill.
4. Accommodation endorsers as such merely, are not liable as co-sureties to contribution. To constitute that relation between successive accommodation endorsers, there must be an agreement to that effect between them, or some fact or circumstance must exist from which such an agreement can be inferred.
5. If the last indorser of a bill be notified of its dishonor, if he wishes to hold any prior party on the bill liable to him, he must give him notice, unless due notice had previously been given to such prior party by the holder.
6. Where the court agrees to give an erroneous charge, if the party asking it will do an act which the court has no power to require him to do, it is error, as it is impossible to know that the party has not been injured thereby.

WRIT of Error to the Circuit Court of Tuscaloosa county.

Assumpsit by Sherrod against Rhodes, to recover the amount of three bills of exchange, each for $6,034. The declaration contains counts on each bill, and also the common counts. The cause was tried at the Fall term, 1842, upon the issues of *non assumpsit*, payment and set-off, when a verdict was found for the defendant; and on this he had judgment.

The case made by the plaintiff at the trial is as follows:

All the bills are dated at Decatur, on the 1st October, 1837, drawn on and accepted by David Deshler, with the addition to his name of Treas. T. C. & D. R. R., payable at the Union Bank of Louisiana. The first was drawn by James T. Sykes, in favor of the defendant; and endorsed by him and the plaintiff.—The second was drawn by A. P. Christian, in favor of Sykes; and endorsed by him, and also by the defendant and the plaintiff. The third was drawn by the defendant, in favor of Christian; and endorsed by him and the plaintiff. The plaintiff at the date of the bills was the President of the Tuscumbia, Courtland and Decatur Rail Road Company; the defendant was a director, and the other parties members of the same corporation. It was agreed between these parties that the bills now sued on should be made by them for the accommodation of the corporation.—

The bills were made and negotiated to Yeatman, Woods & Co., who were strangers to the corporation, by its treasurer. At the time the bills were drawn, and from thence until they fell due, Rhodes had no funds in the hands of the treasurer of the corporation, but during the whole time, and up to the trial, was indebted to it in a sum larger than the amount of the bill drawn by him. A system of financeering was commenced by the corporation in 1833, and had been continued to the date of these bills. The mode was, for the members of the corporation, among themselves, to draw bills upon their treasurer, let him accept them, endorse them, and when those bills fell due, or were about to fell due, if the treasurer had funds of the company to appropriate them to pay the bills so due or falling due; and if not, to have new bills made in the same way to take up the old bills. The bills in suit were made in the usual ordinary mode of financeering adopted and pursued by the corporation. The plaintiff had agreed, as he was very wealthy, and his name a weighty one, that he would endorse any bills the members of the corporation would make in this way, if they would let him be the last indorser.

The bills were not paid at maturity, and Yeatman, Woods & Co. afterwards sued the plaintiff, and recovered from him the whole of two of the bills, and the balance due upon the third.—He paid on these bills an amount exceeding fifteen thousand dollars.

Notice of protest of the bill drawn by Rhodes was sent to Tuscumbia; but he lived near Blount Springs, where there was a post office.

The notices upon the other two bills were sent to Rhodes at Blountsville; but Blount Springs was much nearer to Rhodes' residence than either Tuscumbia or Blountsville, and that was the office at which he received his letters and papers.

Deshler, the treasurer of the corporation on the 16th Nov. 1838, wrote to Rhodes, as follows:

Dear Sir,—Two of the bills held by Yeatman, Woods & Co., which were due at New Orleans, in May and June last, for about $6000 each, are still unpaid, and by a letter from Y, W & Co., some few weeks since, I discover they are becoming impatient, and I fear unless we come to some satisfactory arrangement very soon, they will commence suit. They are willing to take good bills on New Orleans, and I have written to them, promis-

ing that I would endeavor to procure such, and arrange the debt. My calculation is upon you and Maj. H. You are indebted to us to an amount exceeding one of those bills, and I will ask of you, if you can possibly do it, to send me a bill on New Orleans, for say $7000, to mature in May or June next; or if you would prefer to draw on Mobile, it would perhaps answer. Please let me hear from you on receipt, and oblige.

P. S.—I wrote you at Blount Springs, 30th ult., on the same matter, but presume you never received my letter.

Rhodes answered this on the 12th December of the same year, in these terms from Tuscaloosa.

Dear Sir,—Your letter of 16th ultimo, came to hand by last mail and contents observed. I should have answered it from Fairfield, but a week would have elapsed, as we have but one mail a week. You wish me to send you my bill for $7000 on New Orleans or Mobile; that is impracticable, as I should not have the means to pay it. I owe this winter and spring, about $25,000 nearly all in bank, which will absorb my crop at 12 1-2 cents. I have large debts due me in N. Alabama, say about $11,000, but I learn that I may not expect enough from that source to pay what I owe there—about $1,500. It would afford me great pleasure to do what you wish me, but I think from the above expose, you will agree with me, that it would be improper to do so.

The bills mentioned in this correspondence were shown to be, two of those now sued for. On this state of proof, the plaintiff requested the court to instruct the jury,

1. That although Rhodes had not received legal notice of protest, yet that so far as the bill drawn by him was concerned, inasmuch as he had no effects at any time in the hands of the acceptor; but on the contrary, owed the company, he was not entitled to notice of protest. This the court refused to give, but charged the jury, if they believed the testimony that Sherrod was a party to the creation of the bills in the manner described as between him and Rhodes, that Rhodes was entitled to notice, and a recovery could not be had on the bills, unless it was proved that Rhodes had received regular notice.

2. That the correspondence between Deshler and Rhodes, contains an acknowledgment of a liability to pay said bills, and was a waiver by Rhodes of *laches* of notice. This was refused, and the jury charged that the correspondence contains neither a pro-

mise to pay, nor an acknowledgment of a liability to pay these bills, or either of them; and that there is contained in it no waiver of *laches* of notice.

3. That as between Rhodes and Yeatman, Woods & Co., Rhodes was not entitled to notice, and as the said bills had been collected from Sherrod, the last endorser, that upon the money counts of the declaration, Sherrod could recover the amount he paid upon the bill drawn by Rhodes, as so much money paid, &c., by Sherrod, for the use of Rhodes. This was refused.

4. That if the jury believed from the evidence, that the drawers and endorsers of these bills were members of the Tuscumbia, Courtland and Decatur Rail Road company, that these bills were drawn and endorsed to be accepted by the said company, and that the said company might sell the bills to raise funds for their benefit; that the bills were so accepted and sold to Yeatman, Woods & Co. for that purpose, and were by the company permitted to be dishonored; and that afterwards Sherrod as the last endorser was compelled to pay the bills to Yeatman, Woods & Co., by judgment and execution, that then the drawers and endorsers as between each other, were to be considered as sureties for the company, and therefore that the plaintiff is entitled to recover of the defendant one third of the amount paid by the former as contribution.

This was refused, unless the plaintiff would abandon his claim to a recovery for the whole amount against the defendant as the drawer and endorser upon the bills, which the plaintiff declined, and excepted to the several charges given and refused.

The assignment of errors opens all the points ruled by the Circuit court.

Peck and Lindsay, for the plaintiff in error, made the following points:

1. The defendant was not entitled to notice of dishonor of the bill. [9 Porter, 303; 2 Ala. Rep. 368.]

2. The correspondence with Deshler contains a waiver of notice, if otherwise the defendant was entitled to it. [7 Porter, 184; 2 Camp. 188; Bull. N. P. 276; 2 Stew. 713; 2 Camp. 106, 310; Chitty on Bills, 7 ed. 234, 235, 236, chap. 5, 7th head.]

3. The bill in the hands of Yeatman, Woods & Co. could be

recovered without notice. [2 Ala. Rep. 368.] And the plaintiff paying the bill is entitled to stand in their position.

4. Under the circumstances, the plaintiff is entitled to contribution. [Brahan & Alexander v. Ragland, 3 Stew. 258, 266; Farmers' Bank v. Van Meler, 4 Rand. 553; McDonald v. McGruder, 3 Peters, 470.]

COCHRAN and HUNTINGTON, *contra.*

ORMOND, J.—The questions of law presented on the record are, 1. Was the defendant entitled to notice of the dishonor of the bill drawn by him. It is argued that he was not entitled to notice, because he had no funds in the hands of the drawee, and therefore could not be prejudiced by the omission to give him notice that the bill was not paid. The rule here relied on, applies only where the consideration for which the bill is drawn passes to the drawer; in such a case, he is the real debtor, and cannot allege the want of notice; but in this case, the bill was drawn by the defendant for the accommodation of the acceptor, by whom the proceeds arising from its sale was received. He therefore stood in the relation of surety to the acceptor, and was doubtless entitled to notice, as was held by this court in Shirley v. Fellows, Wadsworth & Co. [9 Porter, 300,] and again in Foard v. Womack, [2 Ala. Rep. 368.]

Nor does the fact that the defendant was indebted to the Rail Road Company for the use of which the bill was drawn, in a sum equal to the amount of the bill vary the case in the slightest degree. It does not appear that the bill was drawn in payment of the debt due the company, or that it was contemplated that the defendant should pay it at maturity, but the contrary is most conclusively shewn by the proof. It appears that this bill, with others, was made to raise funds for the Rail Road Company; that the company had been obtaining money in this way for some years previously, and that when the bills fell due, they were paid by the treasurer of the company, if he had the means, if not, other bills were drawn in the same way to take up the old ones. The indebtedness therefore of the defendant to the company, was an immaterial circumstance, which did not affect the defendant's right to notice of the dishonor of the bill.

2. Does the correspondence between Mr. Deshler, the treasu-

rer of the company and the defendant, establish a liability on the part of the defendant, or show a waiver of notice.

Mr. Deshler, in his letter to the defendant, informs him that the bills are still unpaid; that he had received a letter from the holders who were becoming impatient, and that he feared they would sue unless some satisfactory arrangement could be made. He proceeds to inform the defendant, that the holders would take good bills on New Orleans, and that he had written to them promising to procure such. He then reminds the defendant of his debt due the company, and tells him that he calculates on being aided by him, and another gentleman, who is named, and concludes by proposing that he should draw a bill on Mobile or New Orleans for seven thousand dollars.

The defendant, in answer says, it is impracticable to draw the bill, as he would not have the means of paying it, and proceeds to state the amount he has to pay during the winter and ensuing spring, and concludes by saying, "it would afford me great pleasure to do what you wish, but I think from the above expose, you will agree with me that it would be improper to do it."

It is certainly true that a promise by a drawer or endorser to pay a dishonored bill with knowledge of the facts, will be a waiver of the *laches* of the holder, in omitting to make demand or give notice. But we do not think any such promise was made in this case. Mr. Deshler does not intimate in his letter to the defendant that he was under any obligation to pay the dishonored bill, or even that the defendant knew that the bill was still unpaid; but after informing him that such was the fact, states that an arrangement can be made with the holders, by drawing another bill, which he urges the defendant to do, not because it was his duty to pay the dishonored bill, but because he was indebted to the company who had the bill to pay. It was then simply a request to the defendant to pay his debt to the company, and the fact of the dishonored bill is stated to show the urgency of the case, and as a reason why the debt due the company should be paid by the defendant. In this light it was considered by the defendant, who does not attempt to excuse himself for not paying the dishonored bill, but goes into a detail to show his inability then to pay his debt due the company.

The case of Gibbon v. Coggin, [2 Campbell, 188,] relied on by the plaintiff's counsel is entirely unlike this case. In that case,

the drawer of a dishonored bill of exchange was told it was dishonored and called on for payment; he answered, "that his affairs were at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agent were cleared." Lord Ellenborough held, that by this promise, he admitted his liability. In this case, the promise was made in reference to the *dishonored bill*, but in the case at bar, not only was there no promise to pay, but the refusal was not in reference to the dishonored bill, which it was not pretended the defendant was under any obligation to pay, but respected another bill which the defendant was requested to draw, for a reason having no relation whatever to his liability on the dishonored bill. It is therefore very clear that no promise to pay the dishonored bill or waiver of the *laches* of the holder, can be collected from this correspondence.

3. It is further insisted that as the holders knew nothing of the circumstances under which the bills were drawn, defendant, as to them, was not entitled to notice, and that as the plaintiff has been compelled by suit, to pay the holders, he occupies the same condition they were in.

It has already been shown that an accommodation drawer is entitled to notice of the dishonor of the bill, and the circumstance that the holder was ignorant of the fact, that the drawer was a mere surety, will not vary the case. If he omits to give notice, he does so at his peril, and assumes the burden of proving that notice was unnecessary. The remaining part of the charge assumes that the holder may, on giving notice to the last endorser sue any *prior* party on the bill, but the law is clearly otherwise. If the holder intend to sue the drawer and endorsers of a foreign bill, he must give notice to each direct, and in due time. [Chitty on Bills, 9th Am. ed. 367, and cases there cited.] If the plaintiff, when he received notice of the dishonor of the bill, had notified the drawer, that would have charged him, and would have enured to the benefit of the holder as well as the last endorser. [Byles on Bills 164, Hilton v. Shepherd, 6 East. 14. See also 2 Camp. 208, 210, 273.] The defendant not having notice of the dishonor of the bill, either from the holder or the plaintiff, as last endorser, is discharged from liability.

4. The remaining question arises under the last charge of the court. The charge moved for was, that if the jury believed that these bills were drawn and endorsed by members of the rail road

company, to be accepted by the company, and sold to raise funds for the benefit of the company, and were in fact so sold and permitted to be dishonered by the company, and that afterwards the plaintiff, as last endorser, was compelled by the holder to pay the bills, that the drawers and endorsers as between each other, were to be considered as sureties for the company, and that the plaintiff was therefore entitled to recover from the defendant, one third part as contribution. This charge the court refused to give, unless the plaintiff would withdraw his claim to a recovery for the whole amount against the defendant as drawer and endorser of the bills paid by him.

The charge moved for, is founded on the assumption, that because the drawer and endorsers of these bills were members of the Rail Road Company, and drew and endorsed the bills to enable the company to raise funds, that they thereby became co-surities for the company, and therefore each liable to contribute an aliquot part, if one should be compelled to pay the whole.

In the case of Brahan and Atwood, [3 Stew. 247,] the contrary was held to be law, and that the fact merely, that two or more persons were successive accommodation endorsers for another, did not make them co-sureties, but that to constitute that relation there must be an agreement between them to that effect, or some fact or circumstance must exist from which it may be inferred that they intended to be bound as co-sureties, although they have not signed the instrument jointly, but successively. This case has been acquiesced in ever since as a sound exposition of the law, and is so in the opinion of this court, as is shown by the cases there cited. [See also McDonald v. McGruder, 3 Peters' 470.]

In this case, there appears to have been an agreement between the parties in reference to the drawing and endorsing of these bills for the purpose of raising money for the company, in which they all had an interest. What the effect of that agreement was, and whether it authorised the inference that as the money was to be raised for the benefit of a company in which all have an interest, that it should therefore be a common liability, was a question peculiarly for the consideration of the jury. But so far as we are informed by the record, that view of the case was not pressed on the jury, or urged upon the court as the law of the

case. It has been shown, that without an agreement to that effect, or some fact or circumstance from which such an agreement can be inferred, successive accommodation endorsers are not in law co-sureties; the only additional facts here, are that they were members of the company, and that the bills were drawn and endorsed for the benefit of the company; but conceeding that these facts would have authorised the jury to infer that there was any agreement between them to be bound as co-sureties, the court could not so determine, and therefore correctly refused the charge.

There is still another objection to the charge as requested. At common law, one surety who was compelled to pay the debt could only recover from another surety an aliquot part, or that sum which is produced by a division of the debt actually paid by the number of sureties, without regard to their solvency. [Cowell v. Edwards 2 B. & P. 268.] But the rule in a court of chancery is to divide the loss equally among the solvent sureties. This equitable rule has been made the rule at law by a statute of this State. [Meek's Sup. 352.]

By reference to the bills which are set out in the record, and which are the foundation of this suit, it appears that four persons united in drawing and endorsing them, the defendant having drawn one, and endorsed two, and the plaintiff being the last endorser on all. If these four persons, as the motion for instructions assumes were *co-sureties,* then if one should be obliged to pay the whole, if all the others were solvent, he could call on each for one fourth part, if one of them was insolvent, the sum for which the remaining solvent sureties are liable, would be increased to one-third part of the sum paid; and if two were in that condition, to one-half. The defendant could not be called on for one-third part then, unless one of the sureties was insolvent. Such may be the fact, but no such proof appears upon the record, and the charge was therefore abstract, as it assumes the existence of a fact which does not appear to have been proved or admitted.

From this examination, it appears that the court was justified in refusing the charge moved for; this however, the court did not do in unqualified terms, but offered to give it, if the plaintiff would abandon his claim for the whole amount against the defendant as drawer and endorser of two of the bills paid by the plaintiff.

We think it cannot be doubted that this requisition of the court, imposed as a condition on which the charge would be given, cannot be sustained. The theory of the action of *assumpsit*, is, that each count is a separate cause of action, and although most usually we know that in practice, the different counts are mere successive changes rung upon the same demand, yet each count may be, and frequently is, for a special cause of action. The plaintiff had an unquestionable right to proceed against the defendant in his separate counts as drawer and as endorser, and on the common count for money paid to his use, which would be the appropriate mode of demanding contribution from a co-surety. The court therefore had no power to require the plaintiff to relinquish any claim which he had a right to urge before the jury upon the declaration; and it has been shown that he had the right in this case, to go against the defendant either as co-surety for contribution, or on his special counts as drawer and endorser, or for both, according to the proof he might make.

Was he prejudiced by this improper requisition of the court? If the court charge the jury wrong upon an abstract question, that is, upon a proposition not warranted by any evidence in the cause, the party against whom the charge is given is not injured thereby, because the jury ought not to find for him without evidence. If, however, the court correctly refuse such a charge, and then charge the jury wrong in point of law upon facts in evidence, the cause must be reversed, as has been repeatedly held in this court,

That is not the precise predicament of this case, but we think the injurious results are the same in both. In the case first supposed, the cause is reversed, because in presumption of law, the party is injured by the error of the court, although he may have sustained no actual injury, as the jury might have been warranted in finding their verdict as they did, if the law had been correctly expounded. When the instruction under consideration, was moved for and refused, the court had virtually, by its previous charges, as the evidence was documentary, decided the case against the plaintiff on the special counts, and he had excepted to the charges so given. The acceptance by the plaintiff of the offer of the court would have been an abandonment of the exceptions so taken, and consequently of his right to urge them in this court. This the court had not the right to ask him to do.

It is impossible now, that it should be known that this improper

action of the court has not prejudiced the plaintiff. If the charge had been simply refused, it may have been again propounded in terms which the evidence authorised, and which the court would have been bound to give. Indeed, the court admitted the right of the plaintiff, to the charge in the terms in which it was proposed, but refused to give it for a reason which is not tenable.

In addition, the refusal of the court to give the charge asked for unless the plaintiff would abandon his claim on the first counts was equivalent to a declaration, that he could not, without such abandonment recover contribution. That this was well calculated to mislead the jury, declared as it was, in their hearing, if not absolutely certain, is at least highly probable, and according to our previous decisions render it proper that the judgment should be reversed. [Cothran v. Moore, 1 Ala. 423; Toulmin v. Lessesne & Edmondson, 2 ib. 359.]

Let the judgment be reversed and the cause remanded.

SCOTT, SURVIVING PARTNER, &c. v. JONES, ET AL.

1. Where an action is brought against several persons as partners, and one of them suffers a judgment by default, the latter is a competent witness for the other defendants to prove that they were not his partners; for a verdict in their favor will not, under the statute, operate a discontinuance of the action as to him.

WRIT of Error to the Circuit Court of Tuskaloosa.

This was an action of *assumpsit* by the plaintiff in error, against the defendants, joint owners and proprietors of the steam-boat Warrior, to recover damages for the failure of them to deliver in Mobile, according to contract, one hundred bales of cotton, shipped on board that boat at Tuskaloosa. The defendants pleaded *non-assumpsit*, but the case being called for trial, the defendant Hammond, appeared in court and asked leave to withdraw his plea and defence, which was allowed, "and thereupon a judgment by default, was taken against him." The other parties then

went to trial before the jury. In the course of the trial, the other two defendants, Jones and Horner, by their counsel offered Hammond as a witness in their behalf—he being willing and consenting to be examined. The competency of Hammond, was objected to by the plaintiff's counsel, but the objection was overruled, and the party permitted to testify; whereupon the plaintiff excepted, and his exception is duly certified to this court. From the judgment entry, it appears that the same jury to whom was submitted the issue, also assessed the damages upon Hammond's default. A verdict being returned in favor of the other defendants judgment was rendered thereupon.

B. F. Porter and W. Cochran, for the plaintiff in error, contended, that Hammond was an incompetent witness. 1. Because he was a party to the suit. 2. Because he was interested with his co-defendants. To sustain their exception they cited, 5 Burr. Rep. 2727; 1 Dana's Rep. 430; 6 Cow. Rep. 313; 9 Id. 44; 4 Taunt. Rep. 752; 5 B & C. Rep. 287; 1 Strange's Rep. 35, 633; 5 M. & S. Rep. 71; 1 Starkie's Ev. 144; 2 Id. 817, note, v.; App. to 1 Starkie, 598; 1 Phil. Ev. 53 59, 141, note; 3 Id. 1553 C. & H's notes; 1 Car. & P. Rep. 577; 6 Binn. Rep. 319; 1 Day's Rep. 33; 8 Taunt. 139; 20 Johns. Rep. 142; 10 Wend. Rep. 392.

Peck, for the defendant. It is no objection to the witness that he is a party to the record, if he is willing to be examined, and is disinterested, or is called on to testify against his interest. [Duffee v. Pennington, use, &c. 1 Ala. Rep. N. S. 506, and cases there cited.] The competency of such a witness depends upon the fact whether he is interested in favor of the party calling him. That the witness whose testimony is objected to would be incompetent for the plaintiff may be conceded, but he opposes his interest in sustaining the defence of his co-defendants. [Worrall v. Jones, et al.; 20 Eng. Com. L. Rep. 177; Brown v. Brown & Jubb, 4 Taunt. Rep. 752; Albers v. Wilkerson, 6 Gill. & Johns. Rep. 358.]

COLLIER, C. J.—In several of the States, a party to the record is excluded as a witness, upon the ground, that his admission is opposed to policy. [See 2 Phil. Ev. C. & H's notes, 134,

5, 6; 3 Id. 1550.] But it is said, it may now be regarded as settled in the English, and in a majority of the American courts, that the exclusion of a party, whether nominal or real, or both, from being a witness in his own cause, rests mainly on the ground of interest. [3 Phil. Ev. C. & H's notes, 1563.] In Willings et al v. Coosegna, [1 Peters' C. C. Rep.] Mr. Justice Washington says: "The general rule certainly is, that a party to a suit cannot be a witness. But it is equally so, that the interest which that party has in the event of the suit, both as to costs and the subject in dispute lies at the foundation of the rule, and when that interest is removed, the objection ceases to exist." We might add to this other cases in which the law is laid down in equivalent terms, but this is unnecessary. The rule which excludes a party from giving evidence, has not been strictly adhered to in this State. [Prewett v. Marsh, 1 Stew. and Por. Rep. 17; Duffee v. Pennington, 1 Ala. Rep. N. S. 506. See also Lewis v. Post & Main, 1 Ala. Rep. N. S. 65; Stone, et al. v. Bibb, 2 Id. 100.]

The question to be determined is, was Hammond interested in defeating a recovery against his co-defendants. In Marsh v. Smith, [1 Car. & P. Rep. 577,] it was held, that if one defendant suffer a judgment by default, and the other plead and go to trial, the former cannot be a witness for the latter. Best, C. J., remarking, "if this man's evidence is to be admitted to give a complexion to the case, it may go to reduce the damages against him; and therefore, I am of opinion he is clearly interested, and ought not to be received." [See also Bohun v. Taylor, 6 Cow. Rep. 313; Bostwick v. Lewis, 1 Day, 33.]

In Ward v. Haydon and Ventom, [2 Esp. Rep. 552,] which was a joint action of trover, one of the defendant's suffered a judgment by default; and though it was objected that he was incompetent, Lord Kenyon permitted him to give evidence for his co-defendant. The authority of this case we are aware has been questioned, but receives very powerful support from Worrall v. Jones, et al. [7 Bing. Rep. 395.] In that case Tindal, C. J. was of opinion that no case could be found in which a witness had been rejected upon the ground alone, that he was a party to the suit, and stated that many had been adduced in which a joint defendant, who has suffered a judgment by default, has been admitted as a witness against his own interest. He insisted that the only inquiry in a majority of the cases was, whether the witness

was interested in the event of the suit or not; and that interest is the only warrant for his exclusion. He continues, "that a party to the record should not be *compelled against his consent* to become a witness in a court of law, is a rule founded in good sense and sound policy. It forms the point in the decision in the case of The King v. Wooburn, [10 East, 395,] and the decision of that case leads to the necessary inference, that if the party consents to be examined, he is then an admissible witness." The reasoning of the learned judge, in the case cited, might be supported, if it were necessary, by the citation of cases directly in point, and which go to show, that although a defendant who is defaulted, cannot give evidence for the plaintiff where the verdict against his co-defendant would make the latter liable to contribute to the payment of the judgment by default, or in any manner lighten the burdens of the witness, yet he is entirely competent to testify for the other defendant, because he is thereby opposing what is *prima facie* his interest.

In Pilsbury v. Cammett, et al. [2 N. Hamp. Rep. 283,] a judgment was rendered by default against one of two defendants who were sued on a joint contract, and the defaulted defendant was rejected as a witness for the other on the ground, that the contract on which the suit was brought was joint, and in such case, judgment cannot be given against one defendant without the other; consequently, if the jury should find a verdict for the defendant, the judgment by default must be vacated. But where the law was so modified by the legislature, as to allow a recovery to be had against any one or more of the defendants sued on a contract, it was held, that a defendant who was defaulted is, with his consent, a competent witness in favor of co-defendants. [Bradlee, et al. v. Neal, et al. 16 Pick. Rep. 501.]

Conceding that the law is correctly laid down in the two cases last cited, then it will follow that the circuit court did not err in admitting the party as a witness. By the 12th section of the act of 1818, it is enacted, "where any suit shall be instituted against two or more persons as partners in any firm, if one or more persons, not partners in said firm, shall have been sued as such, the court before whom such suit is pending, shall discontinue said suit against such person or persons, as shall appear not to be partners in said firm, and proceed to judgment and execution against all, or any of the defendants in such action, who shall appear to

be partners." [Aik. Dig. 268.] The defendants are sought to be charged, not only as joint owners, but the declaration alleges *in totidem verbis*, that they were interested as partners in running the steam-boat Warrior for freight and hire. In Jones, et al. v. Pitcher & Co. [3 Stew. & P. Rep. 163 to 168,] this court determined that such a declaration was sufficient to show that the defendants were attempted to be charged as partners, and under the statute cited, a judgment might be rendered in favor of some, and against the other defendants.

It does not appear as to what facts it was proposed to examine the party. It may be that as to some he should not have been allowed to testify; but it cannot be assumed that he was incompetent for all purposes. He may have been offered for the sole purpose of showing that the defendants in error were not his partners, as charged by the plaintiff; to prove this fact, he was certainly a competent witness. It results from what has been said, that no error is shown by the record, and the judgment of the circuit court is c onsequently affirmed.

CLAY, J.—Not sitting.

TODD v. HARDIE, ET AL.

1. Where a witness testifies positively, that he was called on to attest a contract between the parties, his evidence should outweigh the testimony of many witnesses, who state collateral facts and circumstances which are inconclusive and at most only persuasive.
2. Where it is doubtful from the proof, whether personal property was sold, or mortgaged, the evidence that the sum advanced was greatly below its value, would be entitled to much weight.
3. The title of the purchaser of personal property, which was delivered, will not be affected by the failure of the seller to make a bill of sale, which he promised to do at some future time.

WRIT of Error to the Chancery Court sitting at Huntsville.

The plaintiff in error filed his bill against the defendants in November, 1836, in which it is substantially alleged that in October, 1828, he mortgaged, or conditionally sold to the defendant Hardie, a negro man named Jack, in consideration of money owing by him to Hardie, and of money then advanced by the latter to pay judgments which had been rendered against him. The aggregate amo nt of these several sums, was about four hundred dollars; that the transaction was not evidenced by any writing entered into between the complainant and Hardie.

It is alleged, that Jack, at the time the contract was made, was delivered to Hardie, and that he is in possession of the defendant Hill, who claims him under a purchase from the defendant Spence, (made in January, 1836,) who was the immediate assignee of Hardie. That a reasonable hire for the slave during the time he has been out of the complainant's possession would more than satisfy the sum for which he was pledged; yet Hardie, and those who have since had possession of him refuse to deliver him to the complainant, asserting that he was not mortgaged, but had been absolutely sold by him at the time he parted with the possession. The bill prays that an account may be taken of the value of Jack's hire, that upon an appropriation of a sufficient sum, to pay what may be due upon the parol mortgage to Hardie, then Jack be adjudged to be the property of the complainant and delivered up &c.

Hardie answered the bill, denying that he had received the slave from Todd as a security for money to be paid at a future day, and affirming that he purchased him fairly and *bona fide* for the sum of four hundred dollars, which was a fair price for him, and fully paid, either in cash, or by the extinguishment of debts due him by the complainant.

Spence denies all knowledge of the contract between the complainant and Hardie, and knew nothing of the claim set up by the former to the slave, but was informed by Hardie that he had purchased him. Relying on that information, he bought the slave of Hardie in 1829 or '30, for the sum of three hundred and fifty dollars, which he considered his value, as he was runaway at the time.

Hill declares his ignorance of the dealings between the complainant and Hardie; admits that in the fall of 1835, he purchas-

ed the slave in question for a full and valuable consideration paid to Spence, without intention to defraud any one.

Wm. Wright and Joseph Pickens, are also made defendants, but as their answer is not regarded by the court as material in the decision of the cause, no special notice will be taken of it.

On the part of the plaintiff, fifteen witnesses were examined. One witness testifies that he understood from both parties, that the slave Jack, was in Hardie's possession under a contract to work for the interest of money which the latter had lent the complainant to pay the estate of Richard Burdine, deceased, as well as money then owing Hardie by the complainant. Witness understood, that Hardie was to let complainant have more money to redeem a negro woman and child from a deed of trust held by W. D. Garner, but from whom he understood it, does not recollect. He afterwards understood that Hardie had bought Jack of complainant, in Huntsville, but heard the latter after that, deny he had sold him.

Another witness states that about the year 1828, as well as he recollects, the complainant was indebted to the estate of Richard Burdine and Wm. D. Garner, that Hardie lent him a sufficient sum of money to pay these debts, and as a security to indemnify its repayment, delivered to him the slave Jack, to hold in trust. Not long afterwards, there was a dispute between the parties, whether an absolute bill of sale should be given for Jack; Hardie contended for this, but Todd insisted upon giving "a lien or deed of trust." Witness understood from both parties that Jack was to remain with Hardie, and work for the interest of the money lent.

Ten of the witnesses state that Jack in 1828, was worth from $800 to $1200, and that his hire has been of the yearly value of $125 to $200. The others testify as to the disputes between the complainant and Hardie since that time, whether the transaction was an absolute sale or not; and also that Hardie lent the money.

Six witnesses were examined on the part of the defendants. One of whom states that he was under the impression that Jack was pledged for money borrowed; another testifies that in the fall of 1828, he was present at the counting room of Col. John Read, in Huntsville, when Hardie purchased the slave Jack of the complainant, for about four hundred dollars; witness knew Jack, who was then present and delivered, and says four hundred

dollars was a full price for him. Witness, recollection is more distinct of the facts stated by him, because he, together with Mr. John T. Smith, was called on to witness the transaction.

The other witnesses examined for the defendants, state that negro men in the fall of 1828, were worth from three hundred and fifty to five hundred dollars, and that Jack was worth from four to four hundred and fifty dollars.

The chancellor was of opinion that the complainant's case was not made out by proof, and accordingly dismissed the bill at his costs.

S. Parsons, for the plaintiff in error.

McClung and Robinson for the defendants.

COLLIER, C. J.—The equity of the plaintiff's bill is not controverted, but it is insisted that its allegations are not only not sustained, but are actually disproved. It is alleged in the bill that the slave Jack was delivered to Hardie by the complainant under a contract that the former should retain him in his possession as security for money due by the latter to Hardie. This allegation is explicitly denied by Hardie, who declares in his answer, that he purchased the slave *bona fide*, for a full and fair consideration paid before and at the time of the purchase. To overbalance the effect of this negative answer, the plaintiff relies upon the testimony of his witnesses who concur in testifying that the sum which Hardie paid him was less than one half the value of the slave, as well as the evidence of the two witnesses, who depose as to a loan of money, and a delivery of the property, as a security for its re-payment. This evidence is unquestionably sufficient of itself to outweigh the answers. One witness affirms positively that the money was advanced by Hardie as a loan, and that the slave was placed in his possession as a mere security for its payment. Placing the deposition of this witness and the answer of Hardie in opposition, and the case stands in equipoise; but the testimony of the other witness, who states that Hardie held the slave under a contract to work for the interest of money, when taken in connection with the evidence in respect to his value, greatly inclines the balance in favor of the complainant.

Thus stands the case upon the plaintiff's proof. Let us now examine it, as presented by the defendants. Their witnesses all

concur in the opinion that Jack was not worth more than four, or four hundred and fifty dollars, at the time the transaction took place between the plaintiff and Hardie; one of them states his impression that he was pledged for money borrowed: another testifies that he was present when the complainant sold the slave to Hardie, for four hundred dollars, or thereabouts, and that he was called on to attest the sale. This latter witness says that the sum paid by Hardie, was the full value of Jack, and that as the day was far spent, a bill of sale was not then made, but was to have been executed at some future time. The positive evidence of this witness, relating as he does, time, place and circumstance, with so much exactness, considering his opportunity for acquiring correct information on the subject, must overbalance the testimony of the plaintiff's witness, who testifies that the slave was held by Hardie under a lien for the money avanced by him. In regard to the statement by one of the defendant's witnesses, that he was under the impression that Jack was pledged for money borrowed, it is entitled to little or no consideration; he does not show how or when that impression was induced, and certainly not from any thing that Hardie did or said.

The answer of Hardie, is certainly equally potent as evidence, with the testimony of the other witnesses of the plaintiff, one of whom states, that the slave was held as security, for money previous to the transaction at Huntsville, when a further advance was understood to have been made, and others express their opinions of his value when he was delivered to Hardie.

Where it is doubtful whether property was sold absolutely or transferred by way of mortgage, evidence showing that it was of much greater value than the sum paid for it, is entitled to great weight, and where there is an *equilibrium* of proof, may incline the scale in favor of a conditional transfer. But the evidence on this point is by no means uniform, nor is the allegation of the bill in harmony with the plaintiff's proof; it takes a medium between the extremes of the testimony. While the complainant alleges the value of Jack to have been seven hundred dollars, some of the witnesses say, he was worth from one thousand to twelve hundred. The defendant's witnesses place his value at four hundred or four hundred and fifty dollars, and this, if we were to speak from the history of the times, we should think a fair estimate. Property of every description was greatly depressed in 1828. We had

not recovered from the extensive embarrassment caused by high prices previous to 1819, the consequences of which produced the pressure commencing in that year, when the revulsion of 1825, again threw us back, and retarded for years, a return to activity in business and apparent properity. These influences were still continuing at the time the transaction took place. But it is needless thus to consider the evidence, to determine which of the witnesses upon a matter of opinion formed from a recollection of things as they existed twelve years previously, is entitled to the highest degree of credit; for we have already intimated that the defendant's testimony when connected with his answer, preponderates over the plaintiff's proof.

But it was argued for the plaintiff, that even conceding the transaction between him and Hardie was intended to be an absolute sale, yet as it was never consummated, the title of the former was not divested, and he was still entitled to recover the slave. If the answer of Hardie, and the testimony of Parker, are to be regarded, there can be no question that there was not only an intention to sell but an actual sale. Hardie affirms it positively, and Parker declares that he was called on by the parties to attest it; that the plaintiff delivered the slave to the former, remarking that he was his (Hardie's) property. This was certainly intended to transfer the title, and what was said about the exetion of a bill of sale, at a future and more convenient time, serves merely to show that Hardie was to be furnished with written evidence of ownership.

We are satisfied that the cause was correctly determined by the chancellor, and his decree is consequently affirmed.

WYATT v. CLEPPER.

1. *Semble;* where the burthen of proving the fairness of a sale made by a sheriff, is thrown upon a defendant he may inquire whether the property did not sell for as much as such property usually brought at sheriff's sale.
2. *Semble;* a deputy sheriff, who has levied a *fieri facias*, may bid for and purchase the property at a sale made by his principal.

Writ of Error to the Circuit Court of Autauga.

This was an action of trover, by the plaintiff in error, against the defendant, in which the declaration alleges the conversion of two thousand bushels of corn. The cause was tried on the plea of "not guilty." On the trial, the plaintiff excepted to the ruling of the court. From the bill of exceptions, it appears that the defendant about the first of February, 1841, removed from the plaintiff's plantation one hundred and fifty bushels of corn. The defendant proved that S. P. Wallace, was at that time the sheriff of Autauga, and that he was his regular deputy; that in that character he levied an execution placed in his hands by his principal, a few days previously, on the corn, which he removed. That in virtue of that levy Wallace sold the corn to A. Hill; while the sheriff was crying it, both Hill and the defendant bid, when the sheriff jestingly remarked, that they had better compromise the matter and divide the corn between them, but the defendant and Hill still continued to bid. The defendant's counsel then inquired of Wallace, if the corn did not sell for as much as corn usually sold for at sheriff's sales, to which question the plaintiff objected, but the objection was overruled, the question was answered, and the plaintiff excepted.

The court instructed the jury, that any arrangement, or combination between the defendant and Hill, to buy the corn for less than its value, or divide it after the purchase, or any neglect to advertise the sale, did not affect the validity of the sale against the defendant, unless there was a combination between Hill the defendant, and the sheriff, and it was carried out at the sale, while the latter was acting as sheriff. In a sale by the sheriff, the defendant could not be considered as his deputy, and as such, forbidden to purchase. The plaintiff then moved the court to instruct the jury, that if from the testimony they believed that the defendant was a deputy of the sheriff of Autauga, that he levied an execution on the corn, that the sheriff sold it, that whilst the defendant and Hill were both bidding for it, the sheriff suggested to them, they had better compromise the matter, that Hill bought the corn and divided it with defendant, who took it from the plaintiff's house, then they must find for the plaintiff; which instructions were refused. The jury returned a verdict for the defendant, and a judgment was thereupon rendered.

Pryor, for the plaintiff in error.

No counsel appeared for the defendant.

COLLIER, C. J.—The facts of this case may be thus succintly stated; the defendant in virtue of an execution, which he held as a deputy sheriff, levied on the plaintiff's corn, which he removed in a few days; that under the execution and levy, the sheriff sold it, and A. Hill became the purchaser; Hill and defendant both bid at the sale, and the sheriff jestingly remarked to them, that they had better compromise and divide the corn; after which they continued to bid against each other. In all this we discover nothing which entitles the plaintiff to recover for a conversion against the defendant, if the case had been submitted to the court on a demurrer to evidence. The inquiry then, as to the price at which the corn sold, was wholly unimportant; but if the burthen of proving the fairness of the sale had been thrown upon the defendant, we can discover no objection to the question, whether it did not sell for as much as was usual at sales by the sheriff. Such sales we are aware are not always a proper test of value, owing to different causes which need not be particularized; and it would therefore seem quite as pertinent to ask the question in the form in which it was proposed by the defendant as to inquire if the corn sold at the usual market price.

The question whether a deputy could buy property at a sale made by the sheriff, did not arise out of the facts, as it was shown that although he bid, he did not become the purchaser. But we would remark without intending to adjudicate the point, that we cannot very well conceive upon what principle such a privilege should be denied him; the case does not come within the reason of the rule, which inhibits one from purchasing at a sale made by himself, nor does it seem to us to involve any question of policy.

The charge of the court, that no combination between the defendant and Hill, unless connived at or participated in by the sheriff, as well as that prayed upon the same point, were not called for by the evidence, and whether given, or withheld, could not have prejudiced the plaintiff. They present grave questions, and open an extensive field for legal inquiry, which, as it is unnecessary, we decline entering upon. Our conclusion is, that the judgment of the circuit court must be affirmed.

ROBINSON AND ANOTHER v. THE STATE.

1. Where a judgment by *default* has been rendered against bail in a criminal case, a revising court will not look to a recognizance found in the transcript, as a part of the record.
2. Although a *scire facias* issued upon a judgment *nisi*, rendered on a recognizance, be served upon all the recognizors, the State may take judgment against some of them, and allow the proceeding to be silently discontinued as to the others.
3. The 25th section of the 8th chapter of the penal code, makes the return of "not found" to an *original* and *alias scire facias* equivalent to the personal service of process.

WRIT of Error to the Circuit Court of Barbour.

Allen V. Robinson was indicted at the term of the circuit court of Barbour, holden in October, 1840, for betting at a faro bank, and a *capias* was thereupon issued to Macon, which was executed by arresting the defendant therein, who entered into a recognizance, with John W. Hinson, Thomas S. Woodward, Wm. C. Gilder, W. F. Baldwin and S. G. Devereux as his sureties, conditioned for his appearance at the circuit court of Barbour, on the third Monday in March, 1841, to answer to the indictment, &c., against him. Robinson not appearing, a formal judgment *nisi*, was rendered against himself and sureties, and a *scirie facias* thereupon issued to Macon, which was returned executed on all the parties but Robinson and Woodward. An *alias scirie facias* was then issued to the same county against the defendants not served, which was also returned "not found;" and thereupon a judgment reciting the judgment *nisi* and affirming that an orinal and *alias scire facias* had been issued and returned not served, and that defendants had failed to appear and show cause why the judgment *nisi* should not be made final, was rendered as follows: "Therefore on motion of the Solicitor, it is considered by the court, that the State of Alabama recover of the said Allen V. Robinson, and the said Thomas S. Woodward, the said sum of three hundred dollars, together with the costs in this behalf." The acknowledgment of the obligors indebtedness by the recognizance is as follows: "A. V. Robinson in the sum of three hun-

dred dollars, and the said securities in the sum of three hundred dollars separately." Robinson and Woodward only sue a writ of error.

Bascom and Brown, for the plaintiffs in error, insisted that the judgment should be reversed. 1. Because it was made final against two only of the obligors in the bond. 2. Because the two obligors against whom a final judgment was rendered, were never served with process. [Hayter v. The State, 7 Porter's Rep. 156.]

Attorney General for the State.

COLLIER, C. J.—In Chiles v. Beal, [3 Ala. Rep. 26,] which was a proceeding by *scire facias* against bail in a civil case, this court held, that although the bail bond was a record, yet it could not be looked to for the purpose of defeating the judgment below; that if there was a variance between the bond actually executed and that described in the *scire facias*, the proper mode of taking advantage of it, was by a plea of *nul tiel record* concluding with a prayer that the same might be inspected by the court; and that a demurrer in such a case would not avail the defendants, because the record mis-recited, does not become a part of the proceedings in the cause, until it is made such by bill of exceptions. In the transcript before us, we find a recognizance in which the recognizors severally acknowledge their indebtedness in usual form in the sum of three hundred dollars, but the *scire facias* describes a joint recognizance for that sum. Neither of the defendants appeared and pleaded, and as we can discover no difference in this respect between bail in civil and criminal cases, as to the manner of showing a variance between the recognizance of bail and the *scire facias*, we think that the recognizance cannot be referred to, for the purpose of showing that the judgment *nisi* does not conform to it.

The proceeding by *scire facias* on a forfeited recognizance is not governed by the rules which apply to actions prosecuted by individuals. Every joint judgment, bond, &c., is declared by statute to be joint and several in its legal effect, and process may be sued out against any one or more of the parties liable thereon, yet if suit is brought against all, and service of process perfected,

there can be no discontinuance as to one without putting an end to the entire case. This enactment has never been considered as applicable to a recognizance of bail in a criminal case, whether joint or several, nor has the more stringent rule of the common law which regulates proceedings on contracts between individuals, been held to inhibit the prosecution of a *scire facias*, and the recovery of the judgment against any one or more of several recognizors. The *scire facias* is regarded as a mere notice to the parties to the recognizance, to show cause why they should not be subjected to the payment of its penalty; the State may call upon such of the parties as its prosecuting officer may select, to show cause and allow the proceedings to be silently discontinued as to the others. [See Howie & Morrison v. The State, 1 Ala. Rep. 113.]

In respect to the second objection, it is enough to say, that the 25th section of the eighth chapter of the act "regulating punishments under the penitentiary system," has modified the law as laid down in Hayter v. The State, and makes the return of "not found" to an *original* and *alias scire facias* equivalent to the personal service of process. The record shows that two *nihils* were returned as to the plaintiffs in error, and according to the view taken of the first point, the judgment is affirmed.

BARKER, ET AL. v. CALLIHAN.

1. Where a writ of error is prosecuted by the defendants in a cause in chancery, a part of them cannot assign that for error which only affects their co-defendants.
2. The loser of notes at gaming, may file his bill in equity to restrain their transfer and the prosecution of suits upon them; and this, whether the loser indorsed them, or passed them by *delivery merely*, or whether they remain in the hands of the winner, or have been transferred to a third person, *with notice* of the circumstances under which the winner acquired them.

WRIT of error to the Chancery Court sitting at Cahawba.

The defendant in error filed an original and supplemental bill against the plaintiffs, which, so far as necessary to be noticed, allege, among other things, that the complainant was the proprietor of two promissory notes for one thousand dollars each, made by George Thomas, and payable to him, the one on the first of March, 1842, the other on the first of March, 1843. That these notes were won from him at a game called Faro, in the town of Selma, in October, 1841, by the defendants, James Barker, Luke Johnson, Daniel Aldrich and James Vardiman, who induced him to get druuk and game with them; while he was thus intoxicated, they defrauded him out of his property.

It is further alleged, that Hugh Ferguson, who is also made a defendant, (with a full knowledge of the foregoing facts, and that the complainant did not intend to submit to the imposition,) acquired the note first due, by purchase or otherwisee, from the persons, or some one of them, who had unjustly obtained it from the complainant.

The defendants, who are charged with having won the notes, made default, and as to them the bill is taken *pro confesso*. The other defendants answer, but Ferguson's answer is alone important to be considered. He states that he purchased the note for the sum of three hundred dollars, paid in cash; does not recollect whether he had notice that the note had been won at cards, or that the complainant still claimed it as his own; denies that he was informed that it was fraudulently acquired by gamblers.

The testimony shows that the notes were payable to complainant or bearer, and were merely delivered up by him without endorsement. That the complainant, and the defendants charged with having won the notes, were seen about the time alleged in the bill, engaged in gaming in Selma; that the complainant was drunk, and shortly thereafter the notes were in the possession of those defendants, and they claimed them as winners.

One witness states facts, and expresses the belief that Ferguson was aware before he purchased the note, that it was acquired by the seller at gaming; and another positively states, that he so informed him. In addition to this, Ferguson resided in the village of Selma, where the matter of the gaming and the loss of the notes were freely spoken of, and actually published by complainant in the town paper, of which Ferguson was a subscriber, and which was regularly received through a carrier. Whether the

publication in the paper was made before Ferguson purchased the note, does not positively appear from the evidence.

The Chancellor adjudged that Ferguson be perpetually injoined from proceeding at law to collect the note of Thomas, and that Thomas be perpetually injoined from paying the notes to any one else than the complainant or his order. *Also*, that complainant recover and have execution for the amount thereof against Thomas. *And*, further, that the complainant pay all costs.

The defendants all join in a writ of error, but under the rule, Barker, Johnson, Aldrich, Vardiman and Ferguson alone assign errors. They insist—1. That the Chancellor erred in decreeing a perpetual injunction against Ferguson. 2. In adjudging that Thomas pay the notes to the complainant—one of the notes not being due when the bill was filed; and there being no evidence to show that it was due when the decree was rendered.

G. W. Gayle for the plaintiff in error.
R. Saffold for the defendants.

COLLIER, C. J.—It is immaterial to the parties who have assigned error here, what decree has been rendered against Thomas, if the cause has been correctly disposed of as to them. They cannot be permitted to allege an error as to him which does not affect themselves. [Morgan v. Crabb, 3 Porter's Rep. 470; Bumpass et al. v. Webb, 4 Porter's Rep. 65.] Here the important question is, whether the defendants claiming the notes, are, as against the complainant, entitled to them: if they are not, it is unimportant to their interests who receives the money.

The jurisdiction of equity in the present case, we think is unquestionable in order to prevent a transfer of the notes and the prosecution of suits upon them. The remedy afforded by a Court of Chancery, is certainly more effectual and complete than an action of detinue or trover could be, conceding that they are maintainable by the complainant. The act of 1812, which enacts that "courts of equity shall have jurisdiction in all cases of gambling consideration, so far as to sustain a bill for discovery, or to enjoin judgments at law," does not confer upon our courts of chancery, the entire jurisdiction they possess in cases of gaming contracts; independent of legislation upon the subject, they

may grant relief in such cases, upon a proper showing being made. [Fenno, et al. v. Sayre & Converse, 3 Ala. Rep. 476. See also Lyon v. Respass, 1 Litt. R. 135.] But it is unnecessary to consider at greater length the question of jurisdiction. It is fully maintained by Roberts v. Taylor et al., [7 Porter's Rep. 256.] There, the court say, that the winner of a note or other security at an unlawful game, "can be considered in no other light than that of a trustee for the true owner"; and a proceeding by bill in equity injoining the maker from paying the money, was strictly correct.

The act of 1807, "to prevent the evil practice of gaming," [Aik. Dig. 209,] enacts that "All promises, agreements, notes, bills, bonds, or other securities or other conveyances whatever, made, signed, given, granted, drawn or entered, or executed by any person or persons whatsoever, after the passing of this act, where the whole or any part of the consideration of such promise, shall be for money or other valuable thing laid or betted at cards, &c., shall be utterly void, and of no effect," &c. In Roberts v. Taylor et al. *supra*, it was held, under the influence of this statute, that the indorsement of a note or bond was a contract within its terms. And being made to pay money lost at gaming, was void as between the original parties to the transaction, or in the hands of one claiming under the indorsee with notice of the circumstances. In the case before us, it is true, that the notes were transferred by delivery merely, but this is not less a contract than if they had been indorsed. It is an agreement within the terms of the statute, that the persons to whom the notes were delivered, should be their proprietors and receive the money thereupon; and if intended to pay losses sustained at the gaming table, is void, and passed no property in the notes to the winners.

The objection that the parties are in *pari delicto*, and equity will not therefore lend it aid to arrest the payment of the notes, cannot be sustained. In the case last cited, the court say, "We hold that in all cases as between the *original parties*, the courts will interfere when the money has not been actually paid" on a gaming security. If, as between the original parties, relief will be afforded against the winner, no argument can be necessary to prove that one claiming under him, *with notice*, stands in the same predicament. This results from the analogies of the law, and from a very general, if not universal rule which places pur-

chasers with notice, upon a footing with those under whom they claim.

The evidence is entirely satisfactory to show, that the notes were lost by the complainant at gaming, as alleged in his bill. Discarding the declarations of that fact made by the winners, and still the testimony is conclusive on the point. It is proved that the complainant while drunk was engaged with them at a game in Selma; that immediately thereafter the notes were in their possession: in addition to this, the agent of the winners informed Ferguson, that the note which he sold him had been won of the complainant. There is other evidence to this point, but it need not be noticed. The declarations of the winners, unexplained, are conclusive against them; and the other facts recited, not only show that the complainant lost them at gaming, but that Ferguson purchased with a knowledge of the fact. This being the case, it follows from what has been said, that the decree of the Chancellor is correct, at least so far as it concerns the parties who have here assigned error; and it is consequently affirmed.

TARVER v. NANCE.

1. The want of funds in the hands of the drawee of a bill, furnishes a sufficient excuse for the failure of the holder to present it for acceptance, and give notice with promptness to the drawer, of its dishonor.
2. A plea which denies that the plaintiff who sues as indorsee of a bill, is its legal proprietor, but affirms that it is the property of an association of individuals, of which the plaintiff is one, and that the plaintiff filled up a blank indorsement of the company with his own name, must be verified as required by the statute, which prescribes the manner in which the burthen of proving an assignment shall be thrown upon the plaintiff.
3. J A T and B F T sue out a writ of error, and enter into bond with surety for its successful prosecution; in the Supreme Court the writ of error is amended by striking out the name of B F T, so as to make it conform to the judgment of the circuit court, which is against J A T alone: *Held*, that the Supreme Court could render no judgment against the surety upon his bond, as B F T, one of his principals, had ceased to be a party to the cause, by order of the court. Whether a recovery could be had against the surety upon his bond as a common law obligation, *quare*?

WRIT of Error to the Circuit Court of Lowndes.

The defendant in error declared against the plaintiff as the drawer of a bill of exchange, dated September 12th, 1838, requesting Messrs. Robinson & Dejarnette, one hundred and twenty days after date, to pay to the order of Ben. F. Tarver, five thousand dollars, negotiable and payable at the Bank of Mobile. The bill is indorsed by the payee to John Tipton, and by the latter to the plaintiff below. In the first count it is alleged, that payment of the bill was regularly demanded at the place designated therein, on the 12th January, 1839; that payment was refused, and due notice thereof given to the drawer, &c. The second count avers that the bill was duly presented for acceptance on the 12th January, 1839; *and further*, that "at the time of the making of the said last mentioned bill of exchange, and from thence until, and at the time when the same was so presented and shown to the said Robinson & Dejarnette for their acceptance thereof as aforesaid, they, the said Robinson & Dejarnette had not in their hands, any effects of the said defendant, nor had they received any consideration from the said defendant for the acceptance or payment by them the said Robinson & Dejarnette, of the said last mentioned bill of exchange, nor hath the said defendant sustained any damage by reason of his not having had notice of the non-acceptance of the said Robinson & Dejarnette of the said last mentioned bill of exchange; of all of which said several premises, said defendant on the day and year last aforesaid had notice, &c." To each of these counts the defendant demurred, and his demurrer being overruled, he pleaded six pleas, on the three former of which issue was joined, and to the latter he demurred, and his demurrer being sustained, the cause was tried by the jury on the issues of fact, who returned a verdict for the plaintiff, on which a judgment was rendered.

The fourth plea alleges that the contract on which the bill in question was drawn, was a partnership transaction, involving the interest of a company of individuals styled the "Real Estate Banking company of South Alabama, at Selma;" that the bill was the property of the company, under a contract made with them through their agent, was drawn by the defendant and indorsed by B. F. Tarver and John Tipton, for the purpose of being negotiated to the company, and was in fact so negotiated, and was thus

and not otherwise drawn and indorsed, and did not until purchased by the company, become a security for the payment of money. That the plaintiff has no title to the bill; that himself and Tipton, as well as others, are members of the company, and its business as a partnership, is still unsettled.

The fifth plea alleges, that the plaintiff never was the legal or equitable owner of the bill, but the same was concocted by the drawer and indorsers, for the purpose of being negotiated to the company, as in the fourth plea mentioned; that Tipton was a member of the company and indorsed the bill in blank, that the same might pass to and vest in them: that the plaintiff was also a member of the company and filled up the indorsement to himself, without any consideration, contrary to the intention of the contracting parties.

The sixth plea alleges, that the bill was drawn and indorsed as aforesaid in blank, for the purpose of selling to the company; that the company, was composed of several individuals named, and others unknown to the defendant; that the bill was sold by the drawer to the company for the purpose of raising money, and was bought by them or their agent with their own notes, and while the bill was the property of the company, the plaintiff filled up the indorsement of Tipton to himself, that the drawer might not be able to pay the same in the notes or bills of the company.

To the ruling of the circuit judge, the defendant excepted, but as errors are only assigned in overruling the demurrers to the declaration, and sustaining the demurrers to the pleas, the bill of exceptions need not be particularly noticed.

G. W. Gayle and Peck, for the plaintiff in error, insisted, 1. That the demurrer to the second count should have been sustained, because it did not aver a notice of presentment and non-acceptance of the bill by the drawees, or any thing equivalent thereto; and cited 9 Porter's Rep. 300; 2 Brock. Rep. 20; 10 Pet. Rep. 572. 2. The fourth plea is good, because it shows the bill to be the property of the banking company, of which the plaintiff was a member; [1 Porter's Rep. 201.] 3. The fifth plea is good, because it shows, that no consideration ever passed from Nance to the drawer or either of the indorsers; that the bill was drawn and indorsed for the purpose of being negotiated to the company, of which the plaintiff was only a member; that according to the

original intention the bill was thus negotiated, and plaintiff filled up the last indorsement to himself without having any right to appropriate the bill to himself. 4. The sixth plea is bad, because by filling up the indorsement to the plaintiff, the defendant is denied the right of paying the bill in the notes of the company. 5. But if all these grounds fail, and the judgment should be affirmed, then there can be no recovery against B. F. Tarver and the surety in the writ of error bond.

W. HUNTER, for the defendant in error. 1. The declaration is clearly good; it excuses the averment of notice by an equivalent allegation. If the the defendant had any just pretence for drawing the bill, it is matter of proof which he should show in his defence. 2. The pleas are certainly bad, because they, in effect, deny the indorsement under which the plaintiff deduces a title, and under the statute should have been verified by an oath. [See Beal and Bennett v. Snedicor, 8 Porter's Rep. 523; Jennings v. Cummings & Mason, 9 Porter's Rep. 309.] 3. As to the writ of error bond, J. A. and B. F. Tarver may be treated as principals; as to what is said of the latter being security in a forthcoming bond, it may be rejected as surplusage.

COLLIER, C. J.—1. The second count is clearly good, even conceding that the want of funds in the hands of the drawee will not excuse the want of notice to the drawer, where the bill was drawn in good faith and upon a just expectation that it would be paid. Where such is the law, if the drawee have *no funds* of the drawer, it is only necessary to prove this fact, to entitle the holder to recover; and if the drawer would bring himself within some exception to the rule, it is incumbent on him to adduce the appropriate proof. In the absence of evidence shewing that the want of effects in the drawee's hands, should not excuse the omission to give notice in the particular case, the conclusion of law is that the drawer has not been prejudiced, and his liability to pay the bill is a necessary consequence. This is the law as applicable to the evidence, and not only the precedents, but principle shows, that the rule of pleading is in harmony with it. The plaintiff generally need only allege what he is bound to prove to entitle himself to judgment. In the present case, this has been done, even according to the view of the law which has been pres-

sed by the counsel for the plaintiff in error. If a defendant would avail himself of exceptions or matters of avoidance, the burthen of doing this rests upon him.

But the second count of the declaration is drawn strictly according to law, as it has been settled in this State, and if sustained by proof entitled the plaintiff to a verdict without regard to the circumstances under which the bill was drawn. In Shirley v. Fellows, Wadsworth & Co. [9 Porter's Rep. 300,] the rule is laid down broadly, that if one draws a bill without having funds in the hands of the drawee, he cannot avail himself of the want of notice of the dishonor as relieving him from liability to pay it. "It would be most iniquitous" says the court "for him to claim a discharge from an actual debt, when he has either substituted no liability on another, or that other, if he paid the debt, would possess the clear and undisputed right to again recover the amount from his drawer." In Foard v. Womack, [2 Ala. Rep. N. S. 368,] the precise question was again considered, with reference not only to our own decisions, but to some of the adjudications of other courts in this country and in England; and the previous case was re-affirmed. It is really difficult to conceive why the drawer should be allowed to insist upon notice in a case like the present, where he could not be prejudiced by the want of it. Why should not the holder be permitted to maintain an action against the drawer in any case, in which the drawee could, if he had paid the bill. It might perhaps have been well if no exception had been made to the rule which requires notice to be given, but we think it would be more reasonable and consonant to the principles of moral justice, to extend the exception to all cases where the drawee has no effects of the drawer in hand, or no steps have been taken to put him in funds. But it is unnecessary to consider this branch of the case at greater length, as we have already seen that the demurrer to the declaration was rightly overruled.

2. Independently of the question whether the pleas disclose a good defence to the action, it is objected that they are not well pleaded, but should have been verified by affidavit. The act of eighteen hundred and nineteen "to regulate the proceedings in the courts of law and equity in this State" enacts, "when any suit shall be instituted by any person, or persons, as assignee or assignees of any bond or other writing, it shall not be necessary for the plaintiff or plaintiffs, to prove the assignment or assign-

ments, unless the defendant or defendants shall annex to a plea denying such assignment or assignments an affidavit, stating that such defendant or defendants, verily believe that some one or more of such assignments were forged; or make oath to the same effect in open court, at the time of filing such plea." [Aik. Dig. 283, § 144.]

In Beal & Bennet v. Snedicor, [8 Porter's Rep. 523,] the plaintiff sued as the indorsee of the payees of a promissory note, and the defendants pleaded that the note sued on, was not, at the commencement of the action, the property of the plaintiff, but then was, and still is, the property of the payees. This plea was adjudged bad on demurrer, because it was not verified as required by the act cited. To the same effect is Jennings v. Cummings & Mason, [9 Porter's Rep. 309.] So under the statute which declares, that it shall not be lawful for the defendant in any suit to deny the execution of any writing, the foundation of an action, unless it be by plea supported by affidavit, [Aik. Dig. 283,]—it has been decided, that where one of several defendants sued on a promissory note as partners, proposes to show, that he was not a partner, he must put in issue the making or adoption of the note by plea supported by affidavit. [Fowlkes & Co. v. Baldwin, Kent & Co. 2 Ala. Rep. N. S. 705.] And under the statute last cited, it was held that a plea which denies that the writing declared on, is the defendant's act *in law*, or in other words insists, that it was not intended to impose a legal obligation, or duty upon him, comes within the spirit and intention of the act, and must be verified by affidavit. [Lazarus, use &c. v. Shearer, 2 Ala. Rep. N. S. 718.]

The pleas demurred to, are clearly defective for the want of the verification required by statute. They all affirm, in effect, that the bill in suit is not the individual property of the plaintiff; that an association of individuals styled the "Real Estate Banking Company of South Alabama at Selma" are its proprietors, and that after it was indorsed to them by a blank indorsement, the plaintiff inserted his name as the last indorsee. These facts are most explicitly alleged in the fourth and fifth pleas, and would seem to be inferrable from the manner in which the sixth plea sets out the indorsement under which the plaintiff deduces title. But the latter plea is objectionable for other reasons. It does not allege that the defendant or either of the indorsers of the bill

ever proposed to pay it in the notes of the company, or that they are now ready and willing thus to pay it; in the absence of any averment of this kind, it cannot be known that the defendant has been prejudiced by the indorsement having been filled up to the plaintiff.

3. The writ of error was sued out in the name of "John A. Tarver and Benjamin F. Tarver, his security in a forthcoming bond," and a bond executed by them, conditioned for its prosecution with effect. But the writ of error has been here amended so as to make it conform to the judgment of the circuit court, which is against John A. Tarver only; and it is objected that there can be no judgment against the surety in the writ of error bond. This objection is made upon the ground, that as the surety undertook for both the plaintiffs in the writ or error, and one of them has ceased to be a party, the surety is discharged.

In Curry v. Barclay, [3 Ala. Rep. 484,] it was held, where the condition of the writ of error bond recites that the judgment sought to be reversed was against two, when in fact it was against one only, this court will not render a judgment against the surety in the bond. In the present case, both John A. and B. F. Tarver appear by the writ of error, and the recital in the condition of the bond, to complain of the judgment of the circuit court, and both of them are principals as it respects the surety. This being the case, we think that the judgment can only be here rendered against John A. Tarver.

But as the effect of the writ of error and bond, was to suspend proceedings upon the judgment until the action of this court was had in the matter, the defendant is entitled to the damages allowed by the statute on a judgment of affirmance in such cases. In declining to render a judgment against the surety, we only determine that he is not liable in the manner provided by the *statute*, without in any manner considering the question of his liability upon the bond as imposing a common law obligation. We have only to add that the judgment of the circuit court is affirmed.

DOE EX DEM. DAVIS v. McKINNEY AND McKINNEY.

1. Where an action is brought by a purchaser at a sheriff's sale, under a *fieri facias*, against the defendant in execution; the admission of the landlord of the latter, to defend with him, *it would seem* could not prejudice the plaintiff, as the landlord would not be permitted to set up a title consistent with the tenant's possession, to defeat a recovery.
2. *Semble;* an order permitting the son to defend an ejectment, brought against the father, for the recovery of the possession of lands, to which the former claims title, is unobjectionable.
3. A father purchased land and paid the purchase money, declaring, at the time, that it was for his son, for whom he intended it as an advancement, and four years thereafter he caused the vendor to execute a deed to the son: *Held*, that the son was not entitled to hold the land, against those who became creditors of the father between the time of the purchase and the conveyance.
4. Where one man buys land in the name of another, and pays for it, it will generally be held by the grantee in trust for the person who pays the money; but the inference of a resulting trust is *prima facie* repelled, where the money is paid by the father or husband, and the deed taken in the name of his child or wife But in such case it is open to explanation, and if shown that the father or husband intended to defraud his creditors, he will be deemed to have a *resulting trust*, which may be subjected to the payment of his debts.
5. Since the statute of 1820, a title in lands which is merely equitable, can only be sold for the payment of debts by suit in chancery: consequently, a purchaser under execution where the defendant had only an equitable title, acquires nothing by his purchase; and the law is the same if the defendant was in the possession.

WRIT of error to the Circuit Court of Perry.

This was an action of ejectment for the recovery of the possession of "a certain lot or parcel of land or ground lying in the town of Marion in the county of Perry," which is particularly described in the declaration by metes. An order was made, pending the cause in the Circuit Court, appointing Samuel A. Townes guardian *ad litem* for Wm. H. McKinney, who was admitted to defend as landlord, and thereupon he confessed lease, entry and ouster, and pleaded *not guilty*, and on that plea issue was joined and submitted to the jury. The plaintiff excepted to the ruling of the Circuit Judge. From the first bill of exceptions it appears, that Wm. H. McKinney was admitted a co-defendant

with Wilson McKinney under the following circumstances, viz: an affidavit was made that the former was the landlord of the latter and his son, an infant under the age of twenty-one years, and went into possession with his father in 1836, and so continued until the fall of 1840—the latter remaining in possession up to the time of trial. The plaintiff's lessor claimed the premises in question as a purchaser under an execution issued against the property of Wilson McKinney, and for which he had a sheriff's deed. To the order admitting Wm. H. McKinney, the plaintiff excepted.

By the second bill of exceptions it is shown, that the plaintiff produced and read to the jury a judgment against Wilson McKinney, rendered by the Circuit Court of Perry, an execution issued thereon, which was levied on the lot in question, and a deed from the sheriff to himself as the highest bidder at a sale under the execution and levy. The defendant, Wm. H. McKinney, proved and read to the jury a deed for the same premises to himself, made by Henry C. Lea on the 24th April, 1840. In respect to this deed, it was proved, among other things, that in the year 1836, Wilson McKinney, being a man of property and unembarrassed, made a contract with Henry C. Lea, then the owner of the lot, for its purchase, and in the course of the year paid him six thousand dollars therefor. At the time the contract was made, Wilson McKinney said to Lea, that he was purchasing the lot for his son, William H., then a minor fifteen or sixteen years of age, for the purpose of placing him on an equality with his other children, to whom he had made advances, and that he wished the deed made to his son.

Wilson McKinney, shortly after the contract with Lea, and payment of the purchase money, went into the possession of the premises, and has retained it ever since—his son the most of his time residing with him. Things remained in this situation until the 24th April, 1840, when the deed was executed by Lea to William H., as already stated. It was also shown, that between the time of the purchase and the execution of the deed by Lea, Wilson McKinney became very much embarrassed, and at the latter period was almost, if not quite, insolvent. The note on which the judgment was rendered upon which the execution was issued, and under which the plaintiff's lessor purchased, was

made by Wilson McKinney, or by a mercantile firm of which he was a partner, in the year 1838.

The plaintiff's counsel requested the Court to charge the jury, that if they believed that, at the time the deed from Lea to Wm. H. McKinney was executed, Wilson McKinney, who had paid the purchase money, was insolvent, then the deed to Wm. H. was void as to creditors whose debts existed prior to its date, and that the plaintiff was entitled to recover. This charge the Court refused to give; but charged the jury, that the question to be tried was, who had the older and superior legal title; and that even if the deed from Lea to Wm. H. McKinney, was but a contrivance on the part of Wilson and his son, to make a voluntary gift to the latter (which facts would make it fraudulent and void as to creditors,) that considering the other features of the case, the deed could not be assailed and set aside for that cause in this action; that the deed from Lea to the son, if *bona fide* on the part of Lea, passed the legal title to the son, and if *mala fide* on the part of Lea, it could only be set aside by suit in chancery, to which he would be made a party. To the admission of the deed by Lea in evidence, the refusal to charge as prayed, and the charge as given, the plaintiff excepted.

The jury returned a verdict for the defendant, and a judgment was thereon rendered against the plaintiff for costs.

H. Davis for the plaintiff in error, insisted—1. That a sheriff's deed conveys whatever interests a defendant in execution had at the time of the sale under execution, and if the defendant in execution be a tenant, the landlord cannot be let in to defend an action brought for the recovery of possession. [2 Porter's Rep. 480; 10 Johns. Rep. 223; 1 Wend. Rep. 102. See also Adams on Ejectment, 227; Lawson v. Orear, 4 Ala. Rep. N. S. 153; 5 Stew. & P. Rep. 426.]

2. A father, largely indebted, cannot voluntarily convey away his estate directly or indirectly, so as to defeat his creditors; and that a transaction which would defraud creditors when consummated according to the usual course of dealing, cannot be legalized by circuity or contrivance. A tenant in possession who has paid the purchase money, under a contract in his own name, has a legal estate, subject to sale under an execution. [3 Porter's Rep. 196; 3 Johns. Ch. R. 481; 11 Mass. Rep. 421; 18 Johns. Rep.

94; 9 Cow. Rep. 73; 19 Wend. Rep. 414; Sugden's Vend. 621; 3 Cow. Rep. 188, *et post.*]

3. A fraudulent deed, though it cannot be canceled at law, may be treated as a nullity on the trial of an ejectment; especially in favor of creditors and those claiming in privity with them. [2 Coke's Rep. 77—83; 9 Porter's Rep. 63; 1 Ala. Rep. N. S. 102; 6 Munf. Rep. 366; 10 Johns. Rep. 461; 18 Id. 94; 12 Wend. Rep. 299; 7 Cow. Rep. 301; Hardin's Rep. 36; 1 Marsh. Rep. 86—114; 9 Cow. Rop. 73; Roberts on Frauds, 520.] The fact that W. H. McKinney went with his father into possession, and lived with him, and the remark of the father to Lea, that he intended the lot as an advancement, cannot support the son's title as against creditors. [1 A. K. Marsh. Rep. 86.] It did not give to the son a right, which even a court of equity would assist in consummating. Wilson McKinney, as against his son, retained all the rights which his contract with Lea gave, up to the time when the deed was executed, and if he had died previous to the latter period, his heirs would have been equally entitled to the lot. The conveyance to Wm. H. created, by operation of law, a trust in favor of the father, and he being in possession, became invested with a complete legal title, by virtue of the statute of uses. [Aik. Dig. 94; 7 Mass. Rep. 189; 19 Wend. Rep. 414.]

4. The act of 1836, "For the relief of tenants in possession against dormant titles," [Aik. Dig. 2d ed. 652,] does not apply to the present case. That although the third section may, in terms, authorize a landlord to defend for his tenant, yet an examination of the entire statute will show its inapplicability.

J. B. Clark, for the defendants, argued, that the cases of Mcgee v. Eastis, [5 Stew. & P. Rep. 426,] Avent v. Read, [2 Porter's Rep. 480,] need not be controverted, that the former, instead of being opposed to the defendants, is an authority in their favor; the latter, as well as Lawson v. Orear, lays down the law according to the rule which had been previously established in New York, and are favorable to the plaintiff. Avent v. Read was decided previous to the act of 1836, "For the relief of tenants in possession against dormant titles," and is expressly abrogated by the third section thereof. In Lawson v. Orear, determined subsequently, no notice is taken of the statute; hence it is

supposed, that the action in that case was commenced previous to its enactment: but if it was not, the case must yield to the positive terms of the act.

But if the statute was placed out of view, the rule of practice would not inhibit the landland from making defence. The rule only applies where the plaintiff seeks to recover the tenant's interest in the premises; but in the present case, a title was asserted inconsistent with that of the landlord, and he should have been allowed to defend against it. [1 Wend. Rep. 316.]

2. It was the interest of Wilson McKinney that the plaintiff's lessor purchased at the plaintiff's sale, and nothing more, and the charge prayed by the plaintiff's counsel was abstract, and properly refused. He stands in the same situation as he would have done had he purchased from Wilson McKinney, and no better. If he had adduced such evidence of title, it could not have availed against one who had a regular chain of legal conveyances; especially when Wilson McKinney was never invested with a title which a court of law would recognize. [Jackson v. Leggett, 7 Wend. Rep. 377. See also Adams on Eject.; 32 Hardin's Rep. 35.]

Wilson McKinney had no such interest in the premises as the statute of frauds would operate upon; he purchased the lot, not for himself, but for his son, and to the latter Lea was bound to make title; so that neither in point of fact, or in law, can he be said to have made a conveyance to delay, hinder or defeat creditors. [See 1 Story's Eq. § 361–2, and note.] The declaration by the father to Lea, when they made their contract, prevented any trust from resulting in his favor, and his subsequent embarrassment can have no influence upon the equitable title which vested in the son.

The deed from Lea to the son could not be avoided, either by the creditors, or a purchaser at a sheriff's sale, by a proceeding at law, and if it could, then the legal title would re-vest in Lea, and would not be subject to an execution against Wilson McKinney. So that, if the deed be fraudulent, a court of equity alone can declare it so, and administer justice to the parties.

The charge of the Circuit Court is believed to be correct; but if not, the plaintiff cannot avail himself of the error, as he cannot, even if the deed to Wm. H. McKinney is void, recover at law. *In fine*, if the plaintiff would recover the lot, or subject it to what

he advanced for the benefit of creditors by his purchase, he must resort to equity.

COLLIER, C. J.—1. The affidavit on which the motion was made in the circuit court, to associate Wm. H. McKinney as a co-defendant, affirms that he was the landlord of his father; and in the argument here, it has been supposed that such is the relation in which the defendants stood to each other. In considering this point, we will assume such to have been the fact.

A purchaser at a sale under execution acquires all the legal rights of the defendant; [Jackson v. Gridley, 18 Johns. Rep. 98;] and the latter becomes *quasi* his tenant, and will be deemed to continue in that character, until an actual disseisin or disclaimer on his part. [Jackson v. Sternbergh, 1 Johns. Cases 153.]

In Avent v. Read, [2 Porter's Rep. 482,] the court say, "It has been held, that in ejectment by a purchaser, under a sheriff's sale, against the debtor, who refuses to give up possession, the defendant cannot shew title in another; for the plaintiff comes into exactly such estate as the debtor had; and if it was a tenancy, the plaintiff will be tenant also, and will be estopped in a suit by the landlord from disputing his right, in the same manner as the original tenant, who becomes *quasi* tenant at will to the purchaser." [See also Jackson v. Bush, 10 Johns. Rep. 232; Jackson v. McLeod, 12 Johns. Rep. 182.] So, where a motion was made by the landlord, upon affidavit to be let in to defend in an action of ejectment, the court said, "The lessor claims nothing inconsistent with the rights of the landlord; the landlord has, therefore, no interest to defend." [Stiles ads. Jackson, 1 Wend. Rep. 103.] It may be well to remark, that in New York there is a statute substantially the same as the twelfth section of the 11 Geo. II, ch. 19. [see 1 vol. R. S. ed. 1829;] and in respect to the English statute, it has been holden to extend only to those cases in which the action is inconsistent with the landlord's title. [Adams on Ejectment, 228.] In such cases, the tenant against whom an action of ejectment is brought, is bound to give immediate notice to his landlord, under the penalty of forfeiting three years' rent of the premises.

By the third section of the act "for the relief of tenants in possession, against dormant titles," [Aik. Dig. 2d ed. 652,] it is enacted, "That in any suit for the recovery of lands and tenements,

which shall be commenced against any tenant for years, at will, or sufferance, it shall be lawful for his or her landlord to enter him or herself a defendant to such suit, and such landlord shall be solely entitled to all the benefits and provisions of this act." The terms of this enactment are certainly broad enough, if literally interpreted, to extend to all cases, and it would really seem that no inconvenience would result from allowing it thus to operate. By making himself a defendant, the landlord cannot urge as a defence any matter which the law did not previously recognize as available, to defeat a recovery by the plaintiff. The provision of the act cited, does not affect the parties' rights; it relates only to the remedy. As then, it was not allowable for the defendant in an execution to defeat the purchaser by showing he held under another, so, neither can the landlord, when let in to defend, set up a title consistent with the possession sought to be recovered. It is immaterial to him whether the plaintiff recovers the possession or not; for, as soon as he comes in, he will be liable to all the burthens and incur all the responsibilities which rested upon the defendant as a tenant. In fact, the recovery of the purchaser, so far as the landlord is concerned, effects nothing more than the substitution of one tenant for another.

Concede, however, that the circuit court, in admitting the landlord to be made a co-defendant, misapprehended the law, yet from the view taken, it is clear that the error could work prejudice to no one; and consequently is not fatal to its judgment. But the facts disclosed in the record, instead of showing that Wilson McKinney was the tenant of his son, would (at law) rather warrant the inference that he was his guardian by nature; and his possession might have been referred to his right to occupy in that character. Supposing such to have been the situation of the defendants, the order, admitting the son to defend with the father, is unobjectionable.

2. It is a principle of law founded in good morals, that every one must be just before he is generous; consequently, a man cannot give property to his children, if he is indebted, to the prejudice of his creditors. The correctness of this rule is admitted, but it is insisted that it has no application to the present case; that the gift dates back to the time when Wilson McKinney purchased the property in question, and it is not shown that he became indebted until two years thereafter. The first branch of

this proposition is not sustained by the facts in the record. It is not pretended that the son was in fact the donee of the money paid to Lea, but it is insisted, that the declaration made by the father to his vendor, had the effect to invest the son with an equitable title from that time, and that the deed executed in 1840, consummated, in law, a title which became binding in equity, four years previously.

The remark of Wilson McKinney to Lea, imposed no legal obligation upon him, nor invested the son with a right which any tribunal would recognize. It merely showed what were then his intentions in respect to the property, but did not take away the privilege of availing himself of the *locus penitentiae*. At most, it was only a promise for which there was no other consideration than *natural love and affection*, and required something further to be done, to place the lot beyond the control of the father.

In Hickman v. Grimes, [1 Marsh. Rep. 86,] the purchaser from the son filed a bill against the son and father, alleging, that the latter had frequently declared he had given the land to the former, and that he would convey it whenever directed by him to do so. The court said, "It is not alleged that he had executed to his son a covenant or deed, binding himself to convey the land in controversy, and a mere promise to convey, founded upon no other consideration than that of blood or relationship, we apprehend is not sufficient to justify a decree for its specific execution. Where such a consideration is united to the efficacy of a deed, and the contract is executory, its execution may be decreed by a court of equity, as was held by this court in the case of McIntire and Hughes," [4 Bibb.] Again: "Such a consideration would certainly not be sufficient to support an action of *assumpsit*, and it is a general rule, that, if an action at law will not lie upon a contract to recover damages for its breach, a court of equity will not decree its specific execution. Besides, it is inferable from all the cases which have any bearing upon this point, that a contract without being by deed, founded upon such a consideration only, would not be sufficient to create a trust at common law, or a use under the statute of uses." This case is directly in point, and harmonizes with the view which we have taken of the law.

The question must then be considered as if no intention had been expressed at the time of the purchase to make a gift to the son, but rather as a gift made at the time the deed was executed

by Lea, in 1840. This being the proper view of the case, the transaction as against one who became a creditor of Wilson McKinney previously, cannot be supported.

3. Where one man buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee, in trust for the person, who so pays the money. This rule of law is founded upon the presumption, in the absence of all rebutting circumstances, that he who supplies the money, means the purchase to be for his own benefit, rather than for that of another; and that the conveyance in the name of the latter, is a matter of convenience and arrangement between the parties for other collateral purposes. But as it is, the intent with which the conveyance is permitted to be made to a third person, which guides the use, the presumption of a trust will be rebutted, where the purchase can fairly be deemed to be made for another, from motives of *natural love and affection.* Thus a purchase by a parent, in the name of a son, *prima facie*, is intended, as an advancement, and repels the inference of a resulting trust for the parent. [2 Story's Eq. 443–5.] So if the husband purchase land, and take a deed in the name of his wife, the transaction will be presumed to be the means of making an advancement to the wife; but it is open to explanation, and if it be shown that the object of the husband was to defraud creditors, he will be deemed to have a *resulting interest* in the premises which may be sold under execution. [Guthrie v. Gardner, 19 Wend. Rep. 414.]

It has been held, that a resulting trust may be proved by parol, and the estate of the *cestui que trust* sold on execution; in fact, it has been so far considered the property of the *cestui que trust*, as to be a defence in an action of ejectment. [Jackson v. Leggett, 7 Wend. Rep. 377.] So, possession has been considered an interest in lands, within the statute of frauds, as evidence of title, and essential to its completion. [Howard v. Easton, 7 Johns. Rep. 205, '6;] yet it has been held, that a mere naked equity can not be sold under execution. [5 Cow. Rep. 485,] but an equitable interest coupled with the possession is the subject of a levy. [Jackson v. Parker, 9 Cow. Rep. 81.] See also 3 Caine's Rep. 189; 16 Johns. Rep. 192.]

In Jackson v. Scott, [18 Johns. Rep. 98,] the court say, "we have decided that a mere equitable interest cannot be sold on execution; but if connected with the possession of the land, the legal

interest of which the possession is evidence, may be sold. The purchaser acquires all the debtor's legal rights, and possession is a legal right. It becomes a different question, whether a court of equity will enforce an equitable interest, which the debtor had in the land, at the instance of the purchaser—a court of law will not inquire what title the defendant, under such circumstances, has. He is precluded from making the objection that he has no title." [See further, Foote v. Colvin, [3 Johns. Rep. 216.]

The decision, we have cited from the New York Reports, in respect to resulting trusts are doubtless influenced to *some extent*, by the liberal provisions of the statute of uses and trusts which has been enacted in that State. A statute which goes quite beyond the 27th Hen. 8, ch. 10, and 29 Car. 2, ch. 3, and even declares that a disposition of lands made to one person in trust for another, shall not vest either legally or equitably in the trustee. [1 R. S. 727, et post, ed. of 1829.]

It has been argued for the plaintiff, that as the statute of Henry the VIII, incorporated the estates of the trustee and *cestui que trust* into one, whether created by a trust express, or implied, our statute of uses also transferred the *legal*, to the equitable estate, and thereby rendered *both a legal estate*, which might be sold under an execution against the *cestui que trust*. If such is the effect of our statute, which we do not propose to consider, it must be conceded, that in the case before us, Wm. H. as against Wilson McKinney has both the legal and equitable estate; and as against the creditors of his father, it is apprehended, that the deed from Lea confers the legal title. Under this state of things the question is, did the plaintiff acquire by his purchase, such a title as will enable him to recover the possession, in an action at law?

By the act of 1812, "regulating the mode of collecting money by execution," [Aik. Dig. 163,] lands are made subject to the payment of judgments or decrees, and the clerks are directed to frame the executions accordingly; "and the sheriff or other officer selling any real estate, shall make a title to the purchaser, which title shall vest in the purchaser all the right title and interest, which the defendant had in and to such real estate, either in law or equity." If this statute was still in force without modification, then it would be no objection to the sale of lands under execution, that the defendant had only an equitable title; but it

has been repealed in part, by the act of 1820, which provides that "no other than the legal title to land or other real estate, shall hereafter be sold or conveyed by virtue of any execution." [Aik. Dig. 173.] The same statute enacts, that "the equitable title or claim to land, or other real estate, shall hereafter be liable to the payment of debts, by suit in chancery, and not otherwise; and when a bill shall be filed for that purpose, all persons concerned in interest, shall be made parties thereto." [Aikin's Digest 287.]

The act last cited, is explicit in its terms, and does not leave the intention of the legislature to be ascertained by construction. It inhibits the sale of an equitable title under execution, and refers the creditor to chancery for an authority to sell it. The occupant of land, with such a title, we think cannot be regarded as having a distinct, an independent possession which may be levied on, but his possession is so intimately connected with the title that it cannot be sold under an execution so as to transfer an interest to the purchaser.

Even conceding that one in whose favor there is a resulting trust, has both the legal and equitable estate which would enable him to maintain or defend an action of ejectment, and still we think, that Wilson McKinney had no *legal title* to the premises in question, which could be sold under execution. He intended the property as an advancement to his son. This is indicated, not only from their relationship, but by his declarations to Lea; and negatives the presumption that he intended that a trust should result to himself. Yet we have seen that the title of the son cannot be upheld to the prejudice of those who were creditors of the father when the deed was executed, and but for our statute of 1820, already cited, the lot might perhaps be sold under execution against the father; especially if he was in possession. Be this as it may, it is perfectly clear that Wilson McKinney, never acquired the legal title under his purchase; that vested in his son by the conveyance, and there, according to the evidence, it remained at the time of the trial of this cause. The title to real estate in this country, does not pass by livery of seisin merely, but our laws contemplate a written conveyance, and he who possesses this *indicium* of ownership, is usually regarded as the person in whom the legal title is vested. So that even if there was a

resulting trust, technically so called, to Wilson McKinney, we should be inclined to think that it was a mere equitable title, which should be subjected to the payment of a judgment through the medium of a court of equity.

We have heretofore held, that the mere occupation or possession of land which cannot ripen into a legal estate, is not such an interest as can be sold under execution. Examples of such possession are furnished by settlers on public lands, executors, guardians, &c. [Rhea, Conner & Co. v. Hughes, 1 Ala. Rep. 219.] In Smith, et al. v. Hogan, [4 Ala. Rep. 93]—we say, it may well be questioned, whether the *mere possession* of real estate, can be sold under execution, where the defendant has an equitable title to the same: the act of 1820, if it does not expressly, would seem impliedly to inhibit such a proceeding. That statute speaks its own meaning, and it would be profitless to speculate about the objects which prompted its enactment.

To conclude, we are of opinion, that Wilson McKinney had not a *legal estate* in the premises, and although the property may have been subject to the payment of his debts, it could not have been levied on and sold on execution. This being the case, it seems necessarily to follow, that the plaintiff, did not by his purchase, and the deed from the sheriff, acquire any title. It is unnecessary to examine with particularity the refusal to charge the jury as prayed, and the charge given; for whether the one should have been given, and the other withheld, is wholly immaterial to the plaintiff. The defectiveness of his own title was, as we have seen, such as to prevent him from recovering. The consequence is, the judgment of the circuit court is affirmed.

THE BRANCH BANK AT MONTGOMERY v. PARKER.

1. Interrogatories propounded to a party under the act of 1837, "More effectually to provide for discoveries in suits at common law," should either in themselves, or by the affidavit of the party exhibiting them, affirm the existence of the facts sought to be elicited, and that they are within the knowledge of the party called on to answer. Although the party thus examined undertake to answer without objection, an exception to his answers for insufficiency, will not be sustained, where the defects of the interrogatories are such, that it does not appear that his answers will be material.
2. A party cannot use his answer to a bill of discovery, as evidence in his favor, unless it is introduced by his adversary, and the same rule applies to answers to interrogatories propounded by one party to the other, under the act of 1837.
3. The fact whether a party was embarrassed, where it is a direct and material inquiry in the cause, cannot be proved by common reputation; but if his embarrassment is shown, by proper evidence, it seems that common reputation is admissible, to bring home a knowledge of the fact to one who resides near him, or who is acquainted with the state of his affairs.
4. To authorize the claimant of property to show on the trial of the right thereto, that he is its proprietor, it is not necessary for the issue specially to affirm that fact; it is enough for the claimant to deny that the property is subject to the execution, in the general terms in which the plaintiff asserts it.

WRIT of Error to the circuit court of Autauga.

This was a trial of the right of property under the statute. In July 1842, a writ of *fieri facias* previously issued at the suit of the plaintiff in error against Ashley Parker, was levied on sundry slaves, as the property of the defendant therein, to which the defendant in error interposed a claim in the manner prescribed by law. An issue was made up by the plaintiff's affirming that the slaves were the property of the defendant in execution, and liable to satisfy the same, and the claimants denying the truth of the affirmation.

Preparatory to a trial, the plaintiff propounded certain interrogatories to the claimant, and as a foundation therefor, an affidavit was made by its attorney, that he believed the answers of the claimant thereto, would be material on the trial of the cause. The claimant answered the interrogatories without objection, but the plaintiff considering his answers to several of the questions

insufficient, filed exceptions thereto, which were overruled by the court.

From a bill of exceptions sealed at the instance of the plaintiff, it appears that the slaves in question were once the property of the defendant in execution, and were levied on at the residence of the claimant, with whom he had been living for the nine or ten months preceding. The claimant on his part, introduced a bill of sale for the slaves from the defendant in execution in consideration of fifty-eight hundred and twenty-five dollars, paid by the former to the latter. It was also proved by the subscribing witness, that he saw the claimant pay some money to the vendor, but does not know the amount; at the same time he saw the latter return ten dollars, stating that he had been overpaid that sum. The claimant then adduced evidence tending to show his ability to purchase the slaves for cash.

The plaintiff then asked a witness whether it was generally reported in the neighborhood of the vendor's residence, before or about the time of the sale of his negroes to the claimant, that he was much embarrassed, to which question the claimant objected, and his objection sustained. The plaintiff also inquired of the witness, whether from what was said by the neighbors of the vendor, about the time referred to in the question first proposed, he would suppose it was generally known in his neighborhood that he was much embarrassed, to which question the claimant objected, and his objection was in like manner sustained. Before the claimant closed his evidence, he offered to read to the jury, his answers to the interrogatories filed by the plaintiff; to this the plaintiff objected, but his objection was not sustained, and the interrogatories and answers read accordingly—all which are made part of the bill of exceptions.

The evidence being closed, the plaintiff moved the court to exclude from the jury, the bill of sale, and all the evidence tending to prove that the claimant was the owner of the slaves, on the ground that it was not admissible under the issue: the court offered to permit claimant to amend the pleadings if the plaintiff would consent, but the latter declining to do so, the court refused to exclude the evidence. To the admission of evidence, and the refusal to exclude evidence as shown above, the plaintiff excepted, &c.

J. W. Pryor, for the plaintiff in error insisted.—1. That the

exceptions to the answers of claimant to the plaintiff's interrogatories should have been sustained. [See act of 1837; 3 Phil. Ev. C. & H's notes, 932, 652, 859, 1206.] 2. The claimant ought not to have been permitted to read the interrogatories and answers as evidence to the jury. Phillips v. Thompson, [1 Johns. Chancery Reports, 141; 3 Phil. Ev. C. & H's notes, 926.] 3. The witness should have been permitted to answer the questions as to the notoriety of the indebtness of defendant in execution in the neighborhood of the latter, because great latitude is allowed where the question is whether there is fraud or no. 4. The form of the issue would not admit the bill of sale and other evidence of claimant's title, as the claimant did not in his response to the issue tendered, assert that he was the owner of the slaves.

G. W. GAYLE, for the defendant in error, contended.—1. That the interrogatories, so far as material, were fully answered. 2. That the interrogatories and answers were evidence for the claimant, either on the ground that they were nothing more than a deposition, or were to be treated as an answer brought from chancery, to be used as evidence. [Greenl. Ev. 397, § 351; 3 Atk. Rep. 408; 9 Ves. Rep. 282.] 3. As to the proof of insolvency, direct evidence by creditors or others acquainted with the indebtedness of the defendant in execution, would be more satisfactory than mere hearsay or rumor in his neighborhood—in fact the latter was properly excluded. 4. The issue was, whether the slaves were liable to the plaintiff's execution, and in the determintion of this question, it was strictly proper for the claimant to prove a title in himself.

COLLIER, C. J.—By the act of 1837, "more effectually to provide for discoveries in suits at common law," it is enacted, "that hereafter any party, plaintiff or defendant in any action at law, pending in any circuit or county court in this State, wishing a discovery from the adverse party, to be used in evidence at the trial of such action, may file written interrogatories to such party and call upon him to answer the same in solemn form on his oath, or affirmation, and if upon such interrogatories being filed, it shall appear to the court by the oath of the party filing the same, or otherwise, that answers to such interrogatories will be material evidence in the cause, and that the interrogatories themselves

are pertinent, and such as the adverse party would be bound to answer upon a bill of discovery in a court of chancery, the court shall allow such interrogatories, and shall make an order requiring the adverse party to answer the same in writing, and in solemn form, on his oath or affirmation, and the answers to such interrogatories being so given and filed, shall be evidence at the trial of the cause, in the same manner, and to the same purpose and extent, and upon the same condition in all respects as if they had been procured upon a bill in chancery for discovery, but no further, or otherwise." *Further*, if the party to whom the interrogatories shall be propounded, shall for sixty days after service of notice and copy thereof, fail to answer the same, or answer them evasively, the court may attach him, and compel him to answer in open court, or may continue the cause and require more direct and explicit answers, &c.

In Goodwin v. Wood, at the last term, it was decided that the object of this statute was to expedite and cheapen the administration of justice, by authorising one party to call upon the other for a discovery at law, instead of resorting to equity; but it did not allow a party to propose to his adversary, any interrogatories, except such as he "would be bound to answer upon a bill of discovery in a court of chancery," and the answers are only evidence in the same manner "as if they had been procured upon a bill in chancery;" consequently, interrogatories seeking the disclosure of certain facts, but which neither themselves, or the affidavit of the party exhibiting them affirmed, to exist, or to be within the knowledge of him to whom they were addressed, were regarded as in the nature of a *fishing bill*, to which no answer would be coerced. The interrogatories propounded in the case before us. are obnoxious to the objection made in the case cited; they call upon the claimant to answer many questions, of which it is not alleged that he had a knowledge. Neither is the pertinency of all these inquiries quite obvious; nor do they derive any aid from the generality of the affidavit, which merely declares the belief that the answers will be material on the trial of the cause. The claimant then might with propriety have refused to answer the interrogatories; but having undertaken to answer them, was he not bound to answer them fully? It is frequently stated as a rule, that "if a defendant submits to answer a bill, he is bound to answer it fully." By

this, says Mr. Wigram, in his treatise on discovery, we are not to understand, that he is bound to answer every question the bill contains. It means nothing more than having elected to make his defence by answer, he cannot urge the demurrable character of the bill only, as a reason for not answering particular questions. The submission to answer, concludes as to that, *but no further*. The rule decides only, that an answer which is the result of *choice*, is subject to the same rules as an answer *from necessity*. [See pages 192–3.] In determining upon the sufficiency of an answer, it is necessary to consider whether the omissions complained of, are material. [Id. 66, 76.] And the party seeking a discovery, is bound to inform the court for what purpose it is sought, in order that the court may judge of its materiality. [Id. 68, 148; Cardale v. Watkins, 5 Mad. Rep. 18.] The answer of the claimant does not discover an intention to answer, but in part only, the numerous minute and searching inquiries contained in the interrogatories, yet he has omitted some. But whether an answer to these, most favorable to the plaintiff would be material evidence on the trial, the defects in the interrogatories are such that we cannot determine. The exceptions to the answers cannot be sustained, without the risk of making a requisition upon the claimant, which may be of no benefit to the plaintiff, and when too the plaintiff should have shown the materiality of the discovery which he sought.

2. The learned annotators upon Phillips on Evidence, consider that the answer to a bill of discovery, is not evidence, at the instance of the party making it, merely because it has been called for by his adversary, and assimilate it in this respect to a notice to produce papers. The complainant may use the defendant's answer or not, as he pleases; so the party who has given notice to produce, may, if he think proper, waive the production and make out his case independently. [See Withers v. Gillespy, 7 Serg't & R. Rep. 14; Blight v. Ashley, 1 Pet. C. C. Rep. 15, 22; Willings v. Consegna, Id. 302, 311; Hylton's lessee v. Brown, 1 Wash. C. C. Rep. 343; 3 Phil. Ev. C. & H's notes, 1206.] An answer in chancery, it is said, is not evidence for the party making it, in any respect, unless his antagonist choose to use it, even though it was called out on a bill of discovery for the purpose of the very suit at law in which it was offered. It is therefore en-

tirely in the election of the party calling for it, whether he will use it or not. [3 Phil. Ev. C. & H's notes 926.]

In Nourse v. Gregory, [3 Litt. Rep. 378,] the question was, whether a party calling for a discovery to be used on a trial at law, was bound by the answer, or could he adduce other evidence contradictory of it. The court said, "we are aware of no principle of law which either compels the plaintiff, after having obtained an answer to such a bill, to use it on the trial of the action at law, or if he should use it, that precludes him from controverting the correctness of its statements by other evidence. An answer to a bill of discovery is entitled to no higher consideration than an answer to any other description of bill, when given in evidence on the trial of an issue at law." And in Kinney v. Clarkson, [1 Johns. Rep. 385,] where the question was, whether if the party giving notice to produce a paper, decline to read it as evidence, it may be used by his adversary. The court said the notice to produce, and calling for the inspection ought to be considered as analogous to a bill for discovery, "where most certainly the answer is not evidence for the adverse party." In Phillips v. Thompson, [1 Johns. Ch. Rep. 141,] a cross bill was filed by the defendant for a discovery by the complainant, to be used on the hearing. The chancellor held, that the complainant could not use his answer to the bill of discovery in the cross suit, unless the defendant choose first to produce it in evidence. That the complainant could not testify for himself, unless at the instance, and on the call of the defendants; and it was for the defendant to determine whether the answer should be evidence in the cause. The law on this point rests upon a principle so familiar, and so universally acknowledged that we deem it unnecessary to add any thing to the citations already made. If it is not allowable for a party to read his answer to a bill of discovery, until the complainant in chancery has first introduced it, the same rule must apply to answers to interrogatories under the statute. The act itself very clearly shows, that it was intended to render a resort to equity unnecessary, and that the interrogatories are but the substitute for a bill. This conclusion sufficiently appears from what was said in Goodwin v. Wood, *supra*. [See also Phil. Ev. C. & H's notes, 926 to 932.]

3. Without undertaklng to consider the materiality of the in quiry as to the indebtedness of the defendant in execution in the

posture in which the record presents this case, we will examine the propriety of the questions intended to show the notoriety of that fact. If it had been shown *prima facie*, that Ashley Parker was embarrassed, then it would have been allowable to prove that the fact was generally known in the neigborhood of the claimant, for the purpose of charging him with a knowledge of it. But the question, *whether indebted or not*, is one susceptible of more definite proof than mere reputation, or hearsay, and cannot be established by that grade of evidence. Such was the view of the law taken by this court, in Ward and Thompson v. Herndon, [5 Porter's Rep. 382.] In the State v. Cochran, [2 Dev. Rep. 63,] the prisoner was indicted for passing counterfeit bills knowing them to be such. To repel the *scienter* which was inferable from circumstances, it was proposed to prove that the prisoner was a man of fortune. He had recently removed from North Carolina to Georgia, and his counsel proposed to inquire of the sheriff "whether it was not generally understood and believed by the neighbors and acquaintances of the prisoner, that he was a monied man, and that he carried considerable money with him on his removal to Georgia." The Judge who delivered the opinion of the court remarked, that he thought common reputation the best and almost the only mode, by which such facts can be established. "They exist in reputation; for although proof may be had that a person had much property in his possession, yet when the question arises collaterally, recourse must be had to common reputation as to his being the owner, and not to the title deeds, and especially whether he is a monied man. Such a character consists of so many distinct facts, as how much had he; was it his—would not his necessities compel him to use it, and not keep it—could he soon replace it—what were his habits that of keeping and dealing in money, or realizing it—that I think it almost impossible otherwise to prove it. Besides it is of such a character, that it is almost impossible for it to become reputation, unless the fact be so." The case cited thus at length pushes the admission of common reputation quite as far, if not farther, than any other that has fallen under our notice, but it is distinguishable from the case at bar. There, the court places its conclusion upon the ground that the question arose collaterally, and the difficulty, if not impossibility, of establishing the fact by direct and positive proof. Here, the fact of indebtedness, if it existed, might be shown

by the evidence of witnesses who knew the fact, or by record or documentary evidence; and in this consists the great difference in the cases.

4. It is perfectly clear that the issue was so framed as to permit the claimant to show, that the slaves in question, were his property. The plaintiff affirmed that they were the property of Ashley Parker, and subject to the execution; both these allegations the claimants denied. It was not allowable to prove that the slaves were the property of some third person; the claimant would not be permitted to defeat the plaintiff by such evidence. The only means by which he could sustain the negative, after the plaintiff had made out a *prima facie* case, was to show that he was the lawful owner of the slaves. This view is decisive of the case, and it is apparent that the circuit court erred in admitting the claimant to read his answer to the interrogatories, when they had not been used as evidence by the plaintiff. The judgment is consequently reversed, and the cause remanded.

ORMOND, J.—The court, in my opinion, did not err in refusing to permit a witness to be asked whether it was not generally reported in the neighborhood where Ashley Parker resided, about the time of the sale of the slaves in controversy to L. Parker, that the former was much indebted or embarrassed. The evident design of this question, was to affect the purchase made by L. Parker, and to raise the inference that the sale was made with intent to delay and hinder the creditors of A. Parker.

The plain design of this evidence, was to authorise the jury to infer, that because it was generally reported in the neighborhood of A. Parker's residence, that he was in an embarrassed condition, that therefore, L. Parker knew it. I am not acquainted with any rule of evidence, which would have authorised the introduction of this testimony. The fact that L. Parker knew of A. Parker's embarrassments, might like any other fact have been inferred from other facts proved to exist, with which the fact to be inferred had a necessary connection, or at least was found to be usually connected with it.

Positive proof cannot always be obtained, and the judgment of mankind, in the ordinary transactions of life, as well as in the jury box, are frequently based upon conclusions, or inferences from facts known, or supposed to exist. These presumptions or infer-

ences, Mr. Starkie says, are deduced by virtue of mere antecedent experience of the ordinary connection between the known and the presumed facts. [1 Starkie's Ev. 38, § 20.]

The test then, of the propriety of the inference attempted to be drawn in this case, is whether the fact to be presumed, is usually found to exist in connexion with the facts proved. When a report has general currency in a community, or neghborhood, every one residing there may know it, but that is not the usual consequence attending it, especially when it does not relate to a matter in which the whole community have an interest. It may, I think, be confidently stated that it is contrary to the experience of every one, that a report relating to the pecuniary concerns of an individual should be known by every individual of the community or neighborhood in which he lived. Indeed, the term *generally* known, implies that it was not *universally* known, and if not, it would be impossible to affirm, and illogical to presume, that any particular individual knew it.

There are other difficulties in the way—the facility with which a report of this character would obtain currency, would be entirely different in a large city and in a village—and again, in a small town and in the country. The character also of the report, would have a most material influence upon the speed with which it would be circulated. Again, in a thick settled country, how is the term neighbor to be defined? These, are I think, insurmountable objections to the rule, and demonstrate its want of legal sanction.

Independently of this objection, it does not appear from the evidence, that L. Parker was a resident of the neighborhood in which this report is said to have prevailed.

I am aware that in Ward and Thompson v. Herndon, [5 Porter, 382,] this court held, that such evidence as I am now commenting on, was admissible to prove that a particular individual knew of the existence of a fact, and I am, in general, disposed to acquiesce in the decisions of this tribunal as binding on this court, as well as the inferior courts; but I consider decisions upon the admissibility of testimony, as forming an exception to the rule; not alone from their constant recurrence, but from their vast importance in the settlement of controversies and ascertainment of rights.

I consider the rule much more correctly laid down in Oden v.

Stubblefield, [4 Ala. Rep. 40] where it was held, that the husband could not be charged with knowledge of a fact because his wife knew it. There is, to be sure, a qualification of the decision which although it might impair its usefulness as a precedent, does not destroy it as a decision upon this point, as the general principle for which I contend is distinctly recognised.

ADAMS v. TANNER AND HORTON.

1. A growing crop has such an existence as to be the subject matter of a sale, mortgage, or other contract, which passes an interest to vest in possession, either immediately or at some future period.
2. Where a debtor mortgages property to secure indorsers, and stipulates that the mortgagees shall take possession at any time they may think proper, to indemnify them against the consequences of their indorsement, when the mortgagees have taken possession, a mere equity remains in the debtor, which is not subject to a levy and sale under a *fieri facias*.
3. The act of 1821, which declares that it shall not be lawful to levy an execution on the planted crop of the defendant until it is gathered, prevents the lien of a *fi. fa.* from attaching until that event: and if previous to that time the defendant makes a *bona fide* sale, or other disposition of his growing crop, the execution creditor cannot subject it to the satisfaction of his judgment, when it is severed from the soil.

Writ of Error to the Circuit Court of Sumter.

This was a trial of the right of property under the statute. In November, 1840, an execution issued from the circuit court of Sumter, at the suit of the plaintiff in error, requiring the sheriff of that county, to make of the goods, &c., of Allen Harrison and others, the sum of thirty-seven hundred and seventy-seven 80-100 dollars, besides costs. This execution was levied on thirty bales of cotton, as the property of Allen Harrison, which was claimed, and a bond given to try the right. An issue was made up to try the question of the liability of the cotton to the plaintiff's execution, and submitted to a jury. On the trial, a bill of exceptions was sealed at the instance of the plaintiff. The plaintiff proved that he recovered his judgment in October, 1839; that an execu-

tion was issued thereon on the 7th Nov. thereafter, and that *alias* and *pluries fieri facias*, issued regularly up to the time levy was made; that the cotton levied on was growed on the plantation of Harrison, and cultivated by the hands in his service. It was proved by the claimants, by the production of a written contract, that Harrison, on the twenty-second of May, 1840, in consideration that the claimants were involved, as indorsers for Burton & Harrison of Sumter county, and were then exposed to an execution, amounting to upwards of fourteen thousand dollars, bargained and sold to the claimants all his growing crop of cotton &c., consisting of one hundred and twenty acres, &c. Allen Harrison promised and obliged himself to give up his crop to the use of the claimants at any time to save them from suffering as his indorsers; if the crop matured and was gathered he undertook to deliver the cotton in Gainesville. The claimants came from Tennessee, (where they resided) about the first of September, 1840, bringing with them three or four white laborers, and took possession of the crop and slaves, and with the latter, and white laborers, gathered the cotton, prepared it for market, and when levied on, it was in a ware-house in Gainesville. The plaintiff then proved by Harrison, that the claimants took possession of the crop, while he was absent, and disposed of it without his consent. It was admitted, that the contract was made in good faith.

The court charged the jury, that the plaintiff had no lien by virtue of his judgment, and execution on the growing crop; that Harrison had a right to convey it, without being in any manner restrained by them; that the writing adduced, was a sale of the crop, but if it was not, and the lien of the *fieri facias* would have attached upon it, when gathered, yet if the claimants obtained possession on the first of September, and controlled the gathering of the crop, then no lien attached, and it was not subject to the levy.

R. H. Smith, for the plaintiff, in error, made the following points.—1. The crop of Harrison, must, in May, 1840, have been in an immature state, and it is insisted, was not the subject of a sale. 2. By the common law, a growing crop could be levied on and sold, [1 Salk. Rep. 361; 1 Bos. & P. Rep. 307; 6 East's Rep. 604, note 1; 2 Johns. Rep. 418, 422; 7 Mass. Rep. 34,] and our statue, [Aik. Dig. § 41, p. 167,] which forbids the levy of an

execution on a growing crop, is to receive a strict construction. It merely inhibits the levy, but the lien attaches, and a levy and sale may be made after the crop matures, and is gathered. 3. The contract does not purport to convey the growing crop, but is a mere executory agreement, requiring some act to be done by Harrison, in order to invest the claimants with the right of property. [Chit. on Con. 112, 207; 3 Johns. Rep. 338, 424; 5 Wend. Rep. 26; 13 Johns. Rep. 235; 8 Dowl. Rep, 693;] and until this act was done, the crop, no matter by who gathered, because liable to be seized for Harrison's debts. A court of chancery would not compel a specific performance of the contract at the claimant's instance. 4. The charge of the court is also objectionable in deciding disputed facts.

W. M. Murphy, with whom was W. G. Jones, for the defendant—cited the act of 1821, [Aik. Dig. 167,] which declares it to be lawful to levy an execution on a planted crop, until it is gathered, and contended that no lien attached in favor of the plaintiff. This being the case, the defendant in execution was not restrained from making the contract which he did with the claimants.

The lien of an execution is destroyed by an injunction, because it takes away the right to levy it. In short, whenever the right to levy an execution is but temporarily suspended, or withdrawn, the lien is during that time lost. [Whipple v. Foot, 2 Johns. Rep. 216; 3 Wash. C. C. Rep. 66; 4 How. Rep. 130.]

It is admitted that the contract between the defendant in execution, and the claimants, was in good faith, if so, the severance and removal of the cotton gave the latter a good title against all creditors of the former.

COLLIER, C. J.—There can be no doubt that a growing crop has such an existence as to be the subject matter of a sale, mortgage, or other contract which possess an interest to vest in possession, either immediately or at some future time. This proposition has frequently been assumed as unquestionable; the point of inquiry generally being, whether under a statute of frauds, such as the 29 Chas. 2, it is a mere chattel, and transferrable by parol without writing. [Chitty on Con. 241–2, 332; Whipple v. Foot, 2 Johns. Rep. 422; Stewart v. Doughty, 9 Johns. Rep. 112;

Austin v. Sawyer, 9 Cow. Rep. 39. See also Ravesies v. Lee & Alston, at last term.] The contract set out in the bill of exceptions, we are inclined to think evidences rather a mortgage than an absolute sale. It recites that the claimants are involved as indorsers of a mercantile firm, of which the defendant was a partner; that an execution for upwards of fourteen thousand dollars against their estate, is in the sheriff's hands, and that a conveyance is made of the crop of cotton, corn and oats, which the grantor agrees to give up at any time to the use of the claimants, so as to prevent injury to them as indorsers. The defendant in execution might at any time have divested the interest which the contract vested in the claimants, by discharging their liability as his indorsers, or a judgment creditor might have satisfied the lien, and when the crop was gathered, have levied on, and sold it under a *fieri facias*.

We will then consider the writing under which the claimants assert a right, as a mortgage with a power to take possession any time during the year, unless they should be relieved from their engagements as indorsers. It is not pretended that their liability has been satisfied, and it is admitted that the parties have acted with good faith, so that it is a dry question of law, whether the right of the plaintiff, or the claimants shall prevail. Assuming for the present that the execution of the plaintiffs did not operate a lien upon the planted crop previous to the contract of May, 1840, we will inquire whether the defendant in execution had such an interest as could be levied on and sold.

The claimants had previous to the levy of the execution taken possession of the crop, prepared the cotton for market, and removed it to a ware-house. This possession, it is insisted, was a trespass, because it was acquired in the absence of the defendant in execution, and without his consent *then* given. Conceding the truth of the facts stated in the bill of exceptions, and we think it will not follow, that the possession of the claimants is a nullity, and that the case must be considered as if they had never interfered with the crop. The contract contains an express undertaking to give up the crop at any time the claimants might require it for their indemnity, and if they took possession of it in the absence of the grantor, (though without his consent,) if he subsequently acquiesced in it, the inference would be, if necessary, that their acts were approved by him. Taking this to be clear

law, and it will be seen, that the defendant in execution at the time of the levy had nothing more than a mere equitable right to redeem the cotton by paying the debts indorsed by the claimants. He had no possession coupled with this equity, but only a naked equity, which it has been held cannot be reached by an ordinary execution. [Perkins and Elliott v. Mayfield, 5 Porter's Rep. 182.]

This brings us back to the question, whether the execution of the plaintiff was a lien on the growing crop, so as to defeat the mortgage to the claimants. It has been frequently mooted whether, at common law, corn, &c., before it is gathered, can be seized under a *fieri facias*. Mr. Dane, in remarking upon this point, says, "The American editor of Bacon's Abridgment, says, 'Wheat growing in the ground is a chattel, and subject to be taken in execution; and the sheriff may suffer it to grow till harvest, and then cut and sell it; or may perhaps sell it growing, and the purchaser will then be entitled to enter, for the purpose of cutting and carrying it away." [He cites Whipple v. Foot, *ut supra*, also Poole's case, Salk. 368; 1 Bos. & P. 397; 6 East, 604, n.] But Whipple v. Foot seems to be the only case that supports his position, that unripe wheat or corn may be taken in execution; and the same editor states that nothing can be taken in execution which cannot be sold. This position, says the learned commentator, is no doubt law. But it is unnecessary to consider how this matter stands at common law. The first section of the act of 1821, "To prevent sheriffs and other officers from levying executions in certain cases, enacts, that "It shall not be lawful for any sheriff or other officer, to levy a writ of *fieri facias*, or other execution on the planted crop of a debtor, or person against whom an execution may issue, until the crop is gathered." [Aik. Dig. 167.] Now here is an express inhibition to levy an execution on a crop while it remains on, or in the ground, and until it is severed from the soil to which it owes its growth. In respect to property thus situated, will the lien of an execution attach *eo instanti* upon its being placed in the hands of an officer? If so, the act cited, will only have the effect of keeping the right to levy it in abeyance until the crop is gathered. The lien of an execution does, not only operate so as to prevent the debtor from disposing of the property on which it attaches, but gives to the creditor the right to have it sold to satisfy his

judgment. The lien and the right to levy are intimately connected, and if the latter be taken away, or suspended, the effect, at common law, is the destruction of the former. This principle is fully established by Mansony and Hurtell v. The President, &c. of the Bank of the United States, and its assignees, and the citations contained in the opinion of the court in that case, as also in my opinion in Wood v. Gary, et al., both decided at the last term. That it was competent for the legislature to have made it unlawful to levy an execution on particular property, until its condition was changed, and still to give it a continuing lien, cannot be doubted; but there is nothing in the act in question to indicate that such is its intention. If the object was merely to suspend the sale, until the crop was gathered, it would have been very easy to have said so in explicit terms, but declaring as the statute does, *in totidem verbis*, that the execution shall not be levied, the legislature must be supposed to have meant what they have expressed. The act was induced by the doubts which existed as to what was the common law, and was intended to remove those doubts by declaring what should be the law in future. It does not create a lien or authorize a levy in a case in which the law, as it then existed, was silent. The idea that the lien attached upon the planted crop as soon as the execution was delivered to the sheriff, though the right to levy it was postponed until a severance took place, is attempted to be deduced from the last words of the section cited, viz: "until the crop is gathered." These words cannot, upon any just principles of construction be regarded so potent as to give to an execution a retrospective effect. They do not refer to the lien, if they did they would postpone it until the crop was gathered; but it is the levy they relate to and postpone until that event takes place.

The right to levy an execution on a planted crop, then, being expressly taken away by the statute, the lien which is connected with and consequent upon that right, never attaches until severance. This being the case, the right of the defendant in execution to make the contract which he did, is unquestionable, and the title of the claimants, coupled as it was with the possession, was paramount to any lien which the execution could exert.

The circuit judge may have mistaken the law in supposing that the contract was a sale, but if he did, an error in that respect was very immaterial, for whether a sale or mortgage, as we have

seen, under the facts of the case, the defendant in execution has no interest that could be seised and sold under execution. There is no assumption of any material fact in the charge; but the possession of the claimant, the time when acquired, the gathering of the crop, &c., are all referred to the determination of the jury; who are instructed, if they find them according to the evidence adduced, that no lien ever attached in favor of the plaintiff. The *bona fides* of the contract was conceded, so that no charge was necessary on that point, and it could not with propriety enter into the inquiry of the jury.

It results from what has been said, that the judgment of the circuit court is affirmed.

DISSENTING OPINION.

ORMOND, J.—The statute which presents the question before the court is, that "it shall not be lawful for any sheriff or other officer to levy a writ of *fieei facias* or other execution, on the planted crop of a debtor, or person against whom an execution may issue, until the crop is gathered." [Clay's Dig. 210, § 46.]

I shall not enter upon the enquiry, whether, at common law, an execution could be levied upon a growing crop, though I apprehend, it would not be difficult to maintain the affirmative of the proposition. It is sufficient for my purpose, that the statute supposes such to have been the law, as it doubtless was the practice.

This act must be considered in connection with the other acts upon the same subject. The policy of the State, as indicated by these statutes, is undeniably that all the property of a debtor, real and personal, to which he has a legal title, shall be subject to sale by execution, and it appears to me that it would be difficult to assign a reason for the exemption of this species of property from the claims of judgment creditors, and for giving to the defendant in execution the right to dispose of it. It appears to me, with all deference, that the argument that because the sheriff was prohibited from *levying* on a "planted crop," that therefore the execution had lost its *lien*, and the debtor had the right to sell it, is a *non sequitur*. The mischief which the statute designed to remedy was, the sacrifice which would be necessarily made by the sale of an immature crop: the statute enables the debtor to retain it until it matures, and by severing it from the soil to put it

in a condition to bring its value—the *lien* in the mean time continuing in the plaintiff in execution.

If further confirmation of the correctness of this view were necessary, it will be found, I think, in the language employed by the legislature. The sheriff is forbidden to levy on a "planted crop" *until the crop is gathered.* Now, if the view taken by the majority of the court, is correct, the right secured to the plaintiff in execution, of levying on the crop after it is gathered, may be frustrated, as it was in this case, by a sale by the defendant in execution, whilst the crop is in an immature state. The construction which has been put upon the statute, involves the singular anomaly, that the legislature, for the protection of the debtor, has forbidden the plaintiff in execution to sell the property of his debtor, because it is not in a condition to bring its value, and yet permits the debtor, voluntarily, by a sale, to submit to the same sacrifice, for his own benefit. It is, in effect, a gift to the defendant in execution, of the growing crop, provided he does not gather it himself, but disposes of it in its then condition. This, I feel a thorough conviction, was not the intention of the legislature; but that it was to secure him from loss, by prohibiting a levy and sale of the crop, until it was gathered, when the temporary suspension of the right to sell, ceased.

THE STATE v. GIVENS.

1. Where writings are not so ancient that they cannot be proved by living witnesses, it is not allowable to prove the hand-writing of a party, by a mere comparison of the disputed paper with a writing admitted, or proved to be genuine. But when in the course of the trial, such evidence is admitted at the instance of the State, the error may be cured, by the court instructing the jury that the evidence was illegal, and should not be regarded by them.
2. A paper which is copied into an indictment for forgery, but touching which there is no allegation, and which can have no influence in determining, whether the defendant is guilty in respect to the forgery charged, is irrelevant to the issue, and cannot, upon proof that the defendant admitted its genuineness, be laid

before the jury, that by a comparison with it of the note alleged to be forged, they may say, whether they were both written by the same hand.

3. Where no evidence is adduced to show that the defendant is guilty of the forgery of a note, as charged, it is not allowable for the jury to compare the note with a paper admitted to be written by the defendant, and if satisfied of the sameneness of the hand-writing, to convict him of the offence.
4. A paper affirming that certain persons are solvent, and able to pay a note to which their names appear as makers, is a written expression of opinion, and not such a writing as may be the subject of a forgery, under act of 1836, defining the punishment of that offence.
5. If the intention to defraud is manifest, forgery may be committed by using a *fictitious* as well as a *real* name.
6. There can be no conviction upon a count charging an intent to defraud a person or corporation which has no existence; for non-entities have no rights to be prejudiced by such an act.
7. Where the charge is the false making of a note, &c., but the count also sets out a written recommendation of the solvency of its makers, without any allegation in respect thereto, the defendant may be found guilty by proof of the forgery of the note, although no evidence is adduced as to the recommendation.
8. Where the accused is guilty on some one or more, but not all the counts in the indictment, the jury should thus limit their verdict, according to the facts of the case; and the court should so instruct the jury when called on by the defendant.

The defendant was indicted in the circuit court of Benton, for forgery. The first count charges, that he "feloniously did falsely make, forge and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, and did willingly aid and assist in the false making, forging and counterfeiting, a certain promissory note, which said false, forged and counterfeited promissory note is as follows, that is to say—"$1000. Benton county, 1st May, 1841. Ten months after date, we promise to pay to the cashier of the Branch of the Bank of the State of Alabama, at Montgomery, or order, one thousand dollars, for value received, negotiable and payable at said bank.

"JOHN NOWLES,
"THOMAS B. CAMBELL,
"Credit Thomas Durden, Agent. "WILLIS G. CLARK."

"GENT.—The above note drawn by John Nowles, and others, is perfectly good. Mr. Nowles is good for twice the amount himself, all or either of the rest is good.

"STEPHEN KELLY,
"THO'S A. WALKER."

"With intention to defraud one John Nowles, one Tho's B. Cambell, and one Willis G. Clark, contrary to the statute, &c."

The second count charges, that the defendant "feloniously did alter and publish as true, a certain other false, forged and counterfeited promissory note," of the tenor of that set out in the first count—"With intention to defraud the Branch of the Bank of the State of Alabama, at Montgomery, a public corporation, he the said Edward L. Givens, at the time he so altered and published the said last mentioned false, fictitious, forged and counterfeited promissory note as aforesaid, then and there well knowing the same to be false, fictitious, forged and counterfeited, contrary to law," &c.

In the third count, the defendant is charged with having in his possession a certain other promissory note of the same tenor as that set out in the first count; that he "feloniously did falsely make, forge and counterfeit, and did cause and procure to be falsely made, forged and counterfeited, and did willingly aid and assist in the false making, forging and counterfeiting on, and to the last mentioned promissory note a recommendation of the makers of the said last mentioned promissory note; which said false, forged and counterfeited recommendation is as follows:" (and is of the tenor of the writing which follows the promissory note in the first count.) "With intention to defraud the said Stephen Kelly and the said Thomas A. Walker, contrary to law," &c.

The fourth count charges the defendant with having in his possession and custody a certain other promissory note of the tenor of that set out in the first count, on and to which was written a false, forged and counterfeited recommendation of the tenor of that copied into the preceding counts. The defendant well knowing the premises, afterwards, to-wit, &c., "feloniously did utter and publish as true, the said false, forged and counterfeited recommendation of the said last mentioned promissory note, with intention to defraud the said Stephen Kelly and the said Thomas A. Walker: he the said Edward L. Givens, at the time he so altered and published the said false, forged and counterfeited recommendation of the makers of the said last mentioned promissory note, then and there well knowing the said recommendation of the makers of the said last mentioned promissory note to be faise, forged and counterfeited, contrary to law," &c.

On the application of the defendant, the venue was changed to Cherokee, and by a jury of that county, the defendant was tried on the plea of "not guilty," convicted, and received the sentence of the law.

On the trial three witnesses were examined for the State. 1. Stephen Kelly, who stated that he did not sign his name to the recommendation of the note set out in the indictment, and that it was not signed with his consent; the defendant in 1841, came by witnesses house, said some of his friends wanted accommodations from the bank, the members of the legislature from Benton were not at home, and his friends could not await their return; the defendant asked witness to suffer him to use his name, and the witness authorized him by power of attorney to sign his name to recommendations "to such good bills of exchange or notes" as he thought proper. Witness knows no such men in Benton county as those whose names are subscribed to the note in question. The conversation between defendant and witness was in Benton county, and there the power of attorney was made. Witness was not very conversant with Thomas A. Walker's hand-writing, but would not suppose his name to the recommendation to have been written by him. The power of attorney was shown to the witness, and he identified it as the one to which he referred.

2. John D. Hoke understood defendant at one time to deny that he had a power of attorney from Kelly, to recommend paper. On comparing the recommendation and Kelly's name thereto with the signatures to the note, witness could not say whether they were written by the same person, but thought there was a resemblance between the name of Nowles as subscribed to the note and written in the recommendation. The letter G, subscribed to the note had a resemblance to the hand-writing to the recommendation: the name of Thomas A. Walker is in a different hand-writing, but it was witnesses opinion, that the name of Nowles in the note and recommendation were written by the same person. Witness knew no such men in Benton county as those whose names were signed to the note; could not say whether the power of attorney, note and recommendation were written by the same hand; his knowledge of the note was derived solely from what appeared on its face; that he had known defendant for several years, and had never heard of any imputation

against his character, until he was charged with the offence for which he was on trial.

3. Thomas A. Walker states that his name to the recommendation, is forged, and he knows no such men as those whose names are signed to the note in question. Witness had heard of the bank frauds in which his name had been used, and in making his third trip to Montgomery, to inquire into them, he met with the defendant, who in a conversation told him that he had a power of attorney from Stephen Kelly, one of the representatives from Benton to recommend bills and notes; that under this authority he had recommended Keith's note and two or three others. In answer to an inquiry, the defendant said, he had never recommended any note where witnesses name appeared to the recommendation. One of the directors of the bank came to Jacksonville, shortly after witnesses return from Montgomery, bringing with him the notes supposed to be forged. The note set out in the indictment was then shewn to the defendant, who was asked if he signed Kelly's name to the recommendation and wrote the same, and he answered affirmatively, but said he did not sign witnesses name, nor know who did. Upon being inquired of, defendant said he knew no men of the names of the makers of the note, residing in Benton county; he was then asked why he recommended the paper if he did not know the makers, to which he said he presumed the person who brought him the note, told him the makers were good, but he had forgotten who brought him the note, or to whom he delivered it, after he recommended it. Defendant said to witness, that he had denied having the power of attorney from Kelly, because Kelly was at the time a candidate for the legislature, and he did not wish to injure him in his election. Witness further stated, that from comparing the names of the makers of the note with the name of Nowles in the body of the recommendation, and the general formation of the letters, both in the names and words of recommendation, and also the word G, the initial of the middle name of Clark, and the word G, at the commencement of the recommendation, it is the opinion of the witness that the same person wrote the recommendation and the fictitious names to the note. This was all the evidence adduced at the trial.

The circuit court has referred, for our decision, the following questions of law, as novel and difficult. 1. Was the testimony

of the witnesses relating to the comparison of hand-writing founded upon such comparison, admissible evidence? 2. After having received such evidence in despite of the defendant's objection, and after the examination of witnesses, and arguments of counsel had closed, was it competent for the court to repair the error by instructing the jury that such evidence was illegal and should be disregarded by them? 3. Is it competent for the jury, by a comparison of hand-writing to conclude that a party charged with the crime of forgery is guilty of that offence? 4. If a person have a power of attorney authorising him to recommend "such good bills of exchange or notes" as he thought proper, to a bank for discount, is he guilty of forgery if he sign the name of his principal to the recommendation of a note signed with the names of fictitious persons, or of real persons not good for the amount, with the intention to defraud the bank or any other person? 5. Should the circuit judge in the present case have instructed the jury, that although they might believe all the evidence, yet they should not find the defendant guilty? 6. If the note was forged, and the ostensible makers were fictitious persons, under an allegation that the forgery was committed with intent to defraud them, could the defendant be found guilty on the first count? 7. Was the writing of the recommendation and subscribing Kelly's name thereto, with intention to defraud, under the laws of this State, a forgery? 8. Should the judge, on motion of the defendant, have instructed the jury, that if they found the defendant guilty, they should express by their verdict on which count they found against him? 9. To authorise the conviction of the defendant on the first count, is it necessary that it should appear that he forged the names of the nominal makers of the note, and *also the names subscribed to the recommendation?* 10. To convict the defendant under the third count, was it necessary for the State to prove that the defendant forged the name of Thomas A. Walker? 11. In order to sustain the third count, was it incumbent on the State to prove that the defendant forged the recommendation with intent to defraud Stephen Kelly and Thomas A. Walker? 12. Is the indictment defective, in charging no offence, in charging more offences than one, in joining a misdemeanor and a felony, or in joining an offence punishable by statute, with one which is indictable at common law? All these questions are raised, either upon an objec-

tion to the admission of evidence, to a prayer for instructions to the jury, to charges given, or to a motion in arrest of judgment.

The ATTORNEY GENERAL, for the State. The note was dated in Benton county, and this in the absence of all proof on the subject, is satisfactory evidence to show, that it was made there: and if the jury should find that it is a forgery, the legal intendment is, that it was there forged.

The indictment is good, though it alleges an intent to defraud persons who had no real existence. If the defendant signed Kelly's name with an intention to defraud, he is guilty of forgery, and his power of attorney will not shield him from punishment. The confessions of the defendant were clearly admissible, and entirely satisfactory to show his guilt. If it was an error to allow the similarity of hand-writing to be shown by comparison, it was cured by informing the jury that such evidence should be disregarded.

E. W. PECK and S. F. RICE, for the defendant. It was not allowable to prove the note and recommendation to have been made by the same hand, merely by the opinion of witnesses formed alone from a comparison. [2. Russell on Crimes, p. 6 sec. 2 & note (2) Id. 363, note (u.)] It has been sometimes said that the jury may compare disputed writings with papers admitted to be genuine. [2 Russell on Crimes, 683, note (2); Greenl. Ev. 616; 2 Ala. Rep. N. S. 703.] In South Carolina and N. Hampshire, it is held, that comparison by the jury may be made to aid doubtful proof, but is not evidence *per se*. [2 McC. Rep. 518; 3 N. Hamp. Rep. 47.] In Virginia, it has been decided that the jury cannot compare a genuine with a doubtful paper in any case. [1 Leigh's Rep. 216; 6 Rand. Rep. 316.] But if the jury could have been allowed to compare the writings, the court erred in admitting the evidence founded on comparison, and that error was not repaired by informing the jury that such evidence was illegal.

The instrument alleged to be forged should be set out in words and figures, that it may be seen whether it be what it is supposed. [2 Russell on Crim. 360.] The recommendation of the note is not such a writing, as could, under our statute be the subject of forgery. [Aik. Dig. 109, 616; 1 Porter's Rep. 33; 2 Johns. Cases, 342; 2 Russell on Cr. 292, note.] Nor will the making of a paper,

in the name of fictitious persons, constitute that offence. [East's P. C. ch. 19, sec. 46, page 957; st. Geo. 11, ch. 25.]

The note and recommendation are to be considered as distinct instruments, and there is no proof that the note was forged, but the confessions of the defendant, and these are inadmissible to establish such a conclusion. [15 Wend. Rep. 147; 16 Id. 53.]

There is no evidence, that the forgery was committed in Benton county, or at any place. Besides, to authorise a conviction of the defendant, the proof should have shewn that the note and recommendation were both forged; otherwise the *allegata* and *probata* will not correspond. The charge as to "uttering and publishing" is insufficient. [2 Peters' Dig. 345, § 14.] The jury should have been directed to apply the evidence to the different counts, and if defendant was not guilty upon all, should have expressed, by their verdict, the extent of his guilt. They also cited 3 Mason's Rep. 464; 3 T. Rep. 104, '6.

COLLIER, C. J.—It is laid down generally, as a rule, in the law of evidence, that it is not allowable to prove the hand-writing of a party by a mere comparison of the disputed paper, with a writing admitted or proved to be genuine. A witness required to testify upon the subject, must possess a previous knowledge, acquired by having seen the party write, or in some other legal manner. This rule has been relaxed where the writings are so ancient that they cannot be proved by living witnesses, and yet are not of such antiquity as to prove themselves. [See Greenl. on Ev. 611 to 616; 2 Starkie on Ev. 375, 6th Am. ed.; 1 Phil. Ev. 4 Am. ed. 490; 3 Phil. Ev. C. & H's notes, 1326 to 1331.]

In the case before us, the witnesses did not testify from any knowledge they had of the defendant's hand-writing, that the note alleged to have been forged, was written in whole, or in part, by him. But comparing the note with the recommendation, which with the exception of the name of Walker, was admitted to have been written by the defendant; they are of opinion, either that the signatures to the note were written by the same hand, or bear a similitude to it. This evidence, according to the rule stated, was the result of a mere comparison, without having an exemplar in the mind, derived from previous knowledge, to which, as a test, they could refer the note; and was consequently improperly admitted.

But the error in the admission of this evidence, we think was cured by instructing the jury, that it was illegal and should be disregarded by them. We have repeatedly held, that a party in a civil cause may withdraw from the jury evidence he has adduced, and thus deprive his adversary of the benefit of an exception; and why the same indulgence should not be extended in a criminal cause, we are unable to discover. The withdrawal of improper testimony, is not to be regarded as the privilege of the party merely; it is not only a right but the duty of the court, upon becoming convinced, pending the trial, that it has sanctioned the admission of illegal evidence, so to inform the jury, and direct them to discard it. A defendant can never be prejudiced by such a course, as it is calculated to expedite justice, and if perchance, the improper evidence has exerted an undue influence on the minds of the jury, the court should accord to the defendant another trial.

Whether it is competent for the jury to assist their judgment by a comparison of writings, is a question about which the authorities do, by no means agree. One class maintains that the jury cannot determine whether a writing be genuine or false, merely by comparing it with another; a second, that they may compare writings for the purpose of settling a question of doubt where the evidence of the witnesses is contradictory; a third, that they may compare two papers, when properly in evidence, and from such comparison form an opinion of the hand-writing; and some of the American cases determine that any papers are admissible, whether relevant to the issue or not, for the purpose of comparison.

In Myers v. Toscan, [3 N. Hamp. Rep. 47,] the court say it cannot be left to the jury to determine whether a signature is genuine or not, by merely comparing it with other signatures proved to be genuine. But when witnesses, acquainted with the hand-writing have been called and examined, other signatures proved to be genuine, may be submitted to the jury to corrobate or weaken the testimony of such witnesses. So in Rowt's adm'x v. Kile's adm'r. [1 Leigh's Rep. 216,] it was determined, that proved specimens of a party's hand-writing could not be laid before the jury, that they might judge by a comparison thereof whether the disputed writing be genuine. [See also Boman v. Plunkett, 3 McC. Rep. 518.]

Mr. Greenleaf, in his work on evidence says, that a comparison may be made by the jury where *other writings* admitted to be genuine, are *already in* the case. The reason assigned for this is, that as the jury are entitled to look at such writings for one purpose, it is better to permit them under the advice and direction of the court to examine them for all purposes, than to embarrass them with impracticable distinctions, to the peril of the cause, [p. 613.] But the learned author says, that documents irrelevant to the issues on the record, cannot, according to the modern English decisions, be received in evidence to enable the jury to institute a comparison of hands. "For this," says he, two reasons have been assigned, namely: *first*, the danger of *fraud in the selection* of the writings offered as specimens for the occasion; and *secondly*, that if admitted, the genuineness of these specimens may be contested, and others successively introduced, to the infinite multiplication of *collateral issues* and the subversion of justice. To which may be added the danger of surprise upon the other party, who may not know what documents are to be produced, and therefore may not be prepared to meet the inferences drawn from them." [Id. 615.] The American cases on this point are by no means uniform, as we have already seen. In New York, Virginia and North Carolina, the English rule has been adopted; while in Massachusetts, Maine and Connecticut, it seems that any papers whether relevant to the issue or not, are admitted for the purpose of comparison of the handwriting. [Id. 616, note 1, and cases there cited; Russell on Cr. 3d Am. ed. 727, note 2.] In the Farmers' Bank of Lancaster v. Whitehill, [10 Serg. & R. Rep. 110,] it was decided, that other evidence being adduced to the point, writings admitted to be genuine will be allowed to go to the jury in a civil case, for the purpose of enabling them to determine by a comparison of hands, whether the paper in question, was written by the party who is sought to be charged with it. [See also McCorkle v. Binns, 5 Binn. Rep. 340.] And in the later case of Callan v. Gaylord, [3 Watt's Rep. 321,] the court say, that in this respect, there is no distinction between civil and criminal cases. See further, [3 Phil. Ev. 1326 to 1331, C. & H's notes,] where the law touching comparison of hand-writing, is largely considered with reference to the English and American decisions.

But there is also a decision of this court, which is pertinent to

the question. In Little, adm'r, &c. v. Beazley, [2 Ala. Rep. N. S. 703,] it was said that "comparision of hand-writing, by submitting different writings having no connection with the matter in issue, is not permitted by law." In the first and second counts of the indictment the defendant is charged with the forgery of a promissory note, which is set out literally; the recommendation is copied into the indictment, but there is no allegation in regard to it. Under these counts the recommendation would not be admissible, because it could have no influence in determining whether the defendant was guilty of the offence charged; and according to the case cited, being irrelevant to the issue on these counts, it could not upon proof, that the defendant admitted its genuineness, be laid before the jury, that by a comparison of the note with it, they might say whether they were both written by the same hand.

The question submitted under the third and fourth counts was, whether the defendant falsely made, &c., the recommendation of the note. To make out this issue, the recommendation, if in existence and within the reach of the prosecutor, was indispensable evidence. Under these counts it may be regarded as having been properly before the jury. The inquiry then arises, whether under such circumstances, the forgery of the note could be proved by comparing it with the recommendation. Whether a comparison by the jury is not permissible, where evidence, other than the genuine and disputed paper has been adduced, we need not consider; for in the present case, no direct proof of the forgery of the note was laid before the jury, but they were directed to determine that question by comparing the note with the recommendation. The law on this point, we have seen, is greatly embarrassed by contradictory decisions, and we will not undertake to lay down with exactness, what is believed to be the true rule on the subject; but we think that mere comparison of papers by a jury, is not allowable in the absence of all other proof, for the purpose of determining whether that, about which there is a controversy, is true or false. Where there is other evidence, and the jury are in doubt, it is perhaps proper, that they should, for the purpose of satisfying their minds, refer to writings which have been offered as proof in the cause. But whether or not it be correct to do so, in the nature of things it would seem impracticable

to prevent it, as the jury are not bound to disclose the grounds on which they attained a conclusion.

No evidence having been given independently of the writings, tending to show that the note was forged by the *defendant*, it follows that the instructions of the court to the jury, that this question might be determined by a mere comparison of hand-writing, was incorrect.

The sixth section of the act of 1836, enacts "that if any person, or persons, shall falsify, make, alter, forge or counterfeit, or cause or procurce to be falsely made, altered, forged or counterfieted, or shall aid or assist in the false making, altering, forging or counterfeiting any letters patent, gift, grant, covenant, bond, writing obligatory, note of any bank of any of the United States, or of any bank established by law, in any one of the said States, or *branch of any territory of the United States*, or any bill or order, or acceptance of such bill or order, cotton receipt, receipt for the payment of money or other articles of value, promissory note, bill of exchange or accceptance thereof, will, indenture or deed, or any instrument of writing whatever, to secure the payment or delivery of money, or other article of value, or in discharge of any debt or demand, with intention to defraud any person or persons, or any corporation, or body politic, or shall either put off or offer, or cause to be offered in payment, exchange, pledge, or for sale, any such false, forged altered or counterfeited bond, writing obligatory, note of any one of the United States, or of any bank established by law in any one of the said States, or bank of any territory in the United States, or any bill or order, or acceptance of such bill or order, cotton receipt, or receipt for the payment of money, or any article of value, promissory note, bill of exchange, or acceptance thereof, will, indenture or deed, or any instrument of writing, or obligation whatever, to secure the payment or delivery of money, or any other article of value, in dicharge of any debt or demand, with intention to defrand any person or persons, corporation or body politic, knowing the same to be false, altered, forged or counterfeited, and shall be thereof convicted, &c." The paper which the defendant is charged in the third and fourth counts with having falsely made, is nothing more than an affirmation that the makers of the note to which it refers were able to pay it. It is a written expression of opinion, and cannot according to the rules of construction be

embraced by the statute cited. This point is too plain to require argument; it is clearly shown by a comparison of the recommendation with the terms employed by the legislature.

Forgery, at common law, has been defined to be "the fraudulent making or alteration of a writing to the prejudice of another man's rights" or "a false making, a making *malo animo*, of any written instrument, for the purpose of fraud and deceit." [2 Russ. on Cr. 3d Am. ed. 317.] There are also many *cheats* and *frauds* which are punishable at common law; whether the procuring of money upon the note by means of a false and fraudulent affirmation in respect to it, constitutes either of these offences, is a question not necessary to be now determined.

Lord Coke once said, "that forgery is properly taken *when the act is done in the name of another person.*" But eleven of the English Judges were clearly of opinion in 1754, that the use of a fictitious name was within the letter and meaning of the statute of 2 Geo. II ch. 25, which, in describing the offence of forgery, speaks only of a false deed, &c., and does not say that it must be made in the name *of any person*, or *of another*. [2 East's Crown L. 957; see also 1 Leach, C. L. 97, 206; 2 Russell on Cr. 328, 9.] And in Rex v. Marshall, [1 Eng. Cr. cases, 74,] it was held, that where one professing to indorse a bill in his own name, indorsed a fictitious name, and thus negotiated it with an intention to defraud the indorsee, he was guilty of forgery. Our statute does not require that the false and fraudulent writing should be made in the name of a person having a real existence, and the construction placed upon the English act, applies with all force to a case arising here; and consequently if the intention to defraud is manifest, it is immaterial whether the names employed indicate real persons or not.

Our statute, it will have been observed, requires, that the forgery shall be committed *with intention to defraud some person, corporation or body politic.* A mere name is not a person, and it is a solecism to say that one can intend to cheat or injure a nonentity. This proposition seems to us to be axiomatic. The books which treat on *forgery* all concur that it is an indispensable constituent of the offence that it should have been committed to the prejudice of another's right. Such purpose or intent to defraud, must be stated in the indictment, and pointed at the particular person or persons, against whom it is meditated. [2 Rus-

sell on Cr. 353, 367.] If then, the ostensible makers of the note were mere imaginary persons, there could be no intent to defraud them, and it will follow that the first count does not charge the offence in a legal manner, and the defendant could not be convicted under it.

If the second count be good (and its sufficiency has not been questioned,) the defendant might be found guilty by proof of its allegations in respect to the note, without any evidence relating to the recommendation. There is no charge whatever, founded upon the recommendation, and though it is set out in the count it will not be treated as an essential part of it, but rather as something superfluous from which no legal consequences follow.

If the defendant was guilty upon either one or more of the counts, but the proof did not warrant his conviction upon the others, the jury could not with propriety find a verdict against him generally; but they should particularise by their finding, which of the counts were established by proof. The instruction prayed by the defendant's counsel on this point was, thus to direct the jury to perform their duty, and should have been given.

The record presents some one or more points on which our opinion is asked, but the questions answered, we think will lead to a correct determination of the cause, so far as the law is concerned. We have no desire to extend our opinion beyond what is strictly necessary, in this important, and in some of its facts, most extraordinary case.

The consequence of what we have said, is, that the judgment of the circuit court is reversed, and the cause remanded, that the defendant may be proceeded against according to law; and in the meantime, he is ordered to remain in legal custody, unless he shall be regularly discharged.

BASS & CARTER v. GILLILAND'S HEIRS.

1. The vendor of land executed a bond, reciting that he had sold to the obligee "half of the south of section 17, &c.:" Held, that as according to our surveys there was no such sub-division, the land sold must have been the "half of the south half of section 17, &c.," and such was but a reasonable construction of the terms used; especially when considered in reference to the principle that authorises a bond to be construed most strongly against the obligor. But if the contract could not be carried into effect by reason of the ambiguity, the bond might be reformed on proof of fraud, mistake, or want of skill in expressing the intention of the parties.
2. Where the vendor of land prevents the vendee from paying the purchase money, according to the terms of his contract, when the latter is ready and offers to pay, he cannot insist upon its non-payment as a reason why he should not be compelled to execute his contract.
3. Although the condition of a title bond, provides, that if the vendee shall pay his notes when the same becomes due, the bond shall continue in full force; if not, then the bond is to be handed over to the vendor and the notes given back to the vendee, it may be questionable whether the vendee can put an end to his contract by failing to pay. But, if when the day of payment arrives, the vendee announces his readiness, and the vendor assents to a delay, the latter cannot refuse to execute the contract upon the ground that the right of rescission was mutual, where it appears that the vendee has been all the time both ready and willing to comply with his undertaking.
4. Where a vendor who has undertaken to convey one-half of a tract of land, states in answer to a bill for a specific performance, that he has conveyed to a third person, about two-thirds of it in quantity and one-half in value; if the vendee elects to take the remaining third, a decree directing a title to vest in him for that quantity, being the lands unsold by the vendor, would be regular.
5. Where the vendee of land files his bill for a specific performance of the vendor's contract, upon an allegation of an actual tender of the purchase money on the day when it became due, an avowal of his continued readiness to pay, and an offer to bring the money into court; if the tender be proved, and there be no evidence to show that the vendee has not retained the money, he should not be charged with interest. And in such a case, an offer to bring the money into court, as the chancellor may direct, is sufficient to authorise chancery to entertain the bill, and administer justice between the parties.

WRIT of Error to the Court of Chancery sitting at Montgomery.

This was a suit commenced by the ancestor of the defendants, in Talladega, and transferred from the chancery court of that county, because the presiding chancellor had been interested as counsel in the cause. The object of the bill was to injoin a suit brought by Bass for the recovery of the possession of the land in question, and to enforce the specific performance of a contract to convey the title to the complainant. The contract of Bass is evidenced by his bond, in the sum of one thousand dollars, dated the 18th April, 1834, conditioned as follows: "The condition of the above obligation is such, that the said John Bass has sold unto John Gilliland, half of the south of section 17, township 18, range 6, which is to be divided equally between them, by two disinterested men, for which he is to pay said John Bass five hundred dollars by the first of October, 1834, for which payment said Bass doth bind himself to make a lawful title so soon thereafter as the patent shall be obtained from government. Now, if the said Gilliland shall well and truly make payment when the same becomes due, this obligation shall remain in full force and virtue, if not, then the bond to be handed over to said Bass, and notes given back to Gilliland." The bill affirms that the purchase money was duly tendered and refused, &c.

As to Carter it is alleged that he had purchased from Bass two hundred and twelve acres of the half section of land, with a full knowledge of the contract between Bass and the complainant.

Bass in his answer, admits the contract as stated between the complainant and himself, denies that a legal tender was made of the purchase money according to the terms of the complainant's contract with him, &c.; insists that the same is at an end, and that he cannot be compelled to convey the land according to the condition of his bond. He admits the sale of a part of the half section of land to Carter, but avers that the part retained by him is of equal value with that sold.

Carter admits the purchase of two hundred and twelve acres, part of the half section; that he purchased with a knowledge of the contract which had been entered into between Bass and the complainant, but the former told him that the latter had forfeited it: *Further*, Bass always told him that he intended Gilliland should have the land on his side the branch, and that he (Carter) should have the part that lay on the side of the branch on which he resided,

Many witnesses were examined at the instance of the complainants, and several depositions were taken for the defendants. The only question arising upon the evidence, is whether Gilliland, the purchaser, tendered the money to Bass on the day it became due, or was excused, or prevented by him from making the legal tender. This question is sufficiently discussed in the opinion of the court, so as to render a recital of the proofs wholly unnecessary.

The chancellor was of opinion that the evidence very satisfactorily shows, that Bass designedly used means to avoid meeting the complainant, and did actually prevent him from making a punctual payment of the money, and that the condition of the bond was sufficiently distinct and certain to enable the court to understand what was the contract of the parties. *Further*, that as the complainants were willing to accept of so much of the half section as had not been conveyed to Carter, in lieu of a moiety thereof, the court adjudged and decreed that the title to the same should be vested in the complainants. The chancellor also determined that it was not a pre-requisite to the relief sought, that the complainant should have paid the money into court, but that the bill was sufficient in offering to pay the money into court whenever directed to do so: and as a condition on which the title would vest, it was competent for the court to require the money to be paid; which in the present case was ordered, but without interest, because a payment was prevented by Bass.

It appearing that five hundred dollars had been paid to the register for the use of Bass, the chancellor rendered a decree according to the principles above stated; adjudging also, that a trial of the suit at law be perpetually injoined, and that Bass should pay all costs: *and lastly*, "that the register pay over the said money to the said Bass, on his delivering up the notes which he holds for the same, to be cancelled, and filing with the register, under his hand and seal, a release of his right to an appeal or writ of error—the register retaining so much of the money as may be sufficient to satisfy the costs for which Bass is liable."

Peck, T. Williams and Rice, for the plaintiffs in error. The complainant was not entitled to a decree in his favor, because the agreement set out in the bill is not sustained by the proof. [4. Porter's Rep. 297; 1, Ala. Rep. 330; 3 Id. 421.] The contract

disclosed in the condition of the bond, is void for ambiguity, apparent on its face; and as neither mistake, or fraud, are charged, it cannot be aided by parol proof. [Paysant v. Ware & Barringer, 1 Ala. Rep. N. S. 164; 2 Story's Eq. 76;] Gilliland was not bound by the bond to perform any duty, but the entire obligation rested upon Bass; as is it not obligatory upon both, it cannot be enforced for want of reciprocity. [Lewis v. Love & Lane, 1 Ala. Rep. 341; 2 Story's Eq. 52–3–75–6–9–80; Parkhurst v. Van Cortlandt, 1 Johns. Ch. Rep. 282; Id. 370; Boucher v. Buskirk, 2 A. K. Marsh. Rep. 345.] *Lastly*, Bass is entitled to interest upon the amount of the purchase money, as Gilliland did not bring the amount of principal into court. A plea of tender is never good, unless the money is actually brought in, and in this respect the bill must be assimilated to such a plea at law.

Moody, for the defendants in error. If it were conceded that the time of paying the purchase money, were of the essence of the contract, it ceased to be so by the subsequent agreement between Bass and Gilliland. Gilliland was desirous, and actually offered to perform his engagement with puntuality, but was prevented by his vendor, who cannot be allowed to profit by his own want of good faith. [2 Story's Eq. 51–2–4.] As to the description of the land in the bond, it is certainly sufficient to indicate the half of the south *half* of section seventeen, &c., but if not, it is then insisted, that the insufficient and ambiguous description is attributable to a meditated fraud on the part of Bass; if a fraud is not inferrable, then there is a mistake, and in either case, the contract will be reformed so as to make it speak the intention of the parties. [1 Story's Eq. sec. 59, 184, 185, 188, 154, 155, 190, 152, 153, 156, 161, and note 1, p. 175; 3 Mason's Rep. 10; 1 Johns. Ch. Rep. 607; 2 Id. 585, 630; 4 Id. 144.] The answer of Bass is sufficient of itself to show what was the contract of the parties; but independently of that, the proof is as full as could be desired to identify the land and show the meaning and intention of the parties.

As to the manner of dividing the land, Bass should not object; he himself divided it according to quality and quantity, as his answer impliedly affirms, by the sale and conveyance to Carter. The complainants assented to this division, and accepted a de-

cree for much less than a quarter section, and the answer of Bass as well as the evidence estops him from objecting to the decree on this point. Gilliland's heirs cannot be charged with interest—the money was kept by the complainants in an inactive state in consequence of the refusal of Bass to accept it, and he shall not derive a profit from it at their expense.

COLLIER, C. J.—It is certainly an acknowledged rule in equity, as well as at law, that the proofs must harmonize with and sustain the allegations of the complainant's bill, in order to entitle him to the relief sought. In the present case, the contract sought to be enforced, is alleged to be an undertaking by Bass to make a title to Gilliland to half of the *south half* of section seventeen, &c.; while the vendor, by the condition of his bond, agrees to perfect the vendee's title to "half of the south of seventeen, &c." It is insisted that the contract is too uncertain in its terms to authorize a court of chancery to enforce its performance, and is not such as the complainant has stated.

The terms employed in describing the sub-division of land, the moiety of which was sold to the complainant, are not so precise and accurate as they should have been; yet it is believed that they are sufficiently descriptive to indicate what was the contract of the parties. By the half of the south of a section, we must understand a quarter section; the south of it must have some legal sub-division, and as there is none to which that term can appropriately apply but a half section, the reasonable conclusion is, that, that was the quantity intended to be described.—*Again:* Such a construction must be placed upon the contract that it may if possible be effectual, *ut res magis valeat quam pereat*, and to this end, it is allowable to interpret it most strongly against the obligor. If there were reasonable doubt upon the face of the agreement, what was the extent of the obligation of the vendor, that doubt would be removed by the application of these rules.

But if it were conceded that the written evidence of the contract is too imperfect to warrant such a decree as the bill seeks, does the conclusion follow, that the defect cannot be supplied by extrinsic proof. Will not a court of equity reform a contract, so as to make it conformable to the precise intent of the parties, if from fraud, mistake, or want of skill, the meaning and intention of

the parties has not been properly expressed, but has in reality been changed. [Paysant v. Ware, Barringer, et al., 1 Ala. Rep. 160, and cases there cited.] The answer of Bass, as well as the proofs in the cause, very satisfactorily show that half of the south half of the section was the subject matter of the sale, and if the bond does not prove this, it is to be attributed to fraud, mistake or want of skill in drawing it: and upon either ground, might (if necessary) be reformed.

We will not inquire whether, to entitle the vendee to a specific performance, it was indispensable that he should have paid or tendered the purchase money on the day it became due; but conceding this to have been necessary, we will consider whether it was done, or dispensed with by the vendor. On the day appointed, the vendee meets Bass in the neighborhood of the residence of the latter, and proposes to pay him five hundred dollars, the amount stipulated, which the vendor refuses to receive, because some of it was bank bills: the parties then separate, the vendee to go to a neighbour's to get the specie, with the agreement that they should meet again in the evening, when the vendor would receive the money. In the course of the day the vendee received several hundred dollars in specie, met the vendor and offered to pay it; the vendor then proposed, that as it was late, and he was not at home, the vendee should call at his house the next morning: this was assented to. The next morning, a large majority of the witnesses testify that the vendee went to the vendor's house with the avowed purpose of paying him the money, about eight, or half past eight o'clock, but the latter had left home about fifteen minutes previously; the vendee went in pursuit of him, but whether he overtook him does not positively appear. The next week, the vendee having in his possession more specie than was due to the vendor, offered to pay him so much as he was entitled to. In addition to all this, it is shown that Bass frequently said before the money became due, that the vendee should not have the land if he could prevent it; that he could not get the money at the day it was payable; that the contract was defective, &c.

It is perfectly clear that the vendor assented to the non-payment on the day the money became due, and on the succeeding day he prevented the payment by having left home at an early hour. The vendee seems to have been prompt in endeavoring

to comply with his contract, and to have done as much as could reasonably have been expected of him. When the vendor waived a strict performance by the vendee, and designated another day, it was incumbent on the latter to pay on that day, or excuse himself for the neglect. Here, the vendee was in no default, but attended at the appointed time and place with requisite promptness; having done this, he could not be expected to remain at the vendor's house until his return, or follow him from place to place. It was quite sufficient that he renewed the offer to pay, upon meeting him the next week.

If then, fault rests upon any one, for the non-payment of the purchase money, it is the vendor, and he cannot, consistently with the principles of natural justice and equity, set it up as a ground why a specific performance should not be coerced.—[Driver v. Fortner, 5 Porter's Rep. 21, 22, and cases there cited.]

It is argued for the plaintiff in error, that as the contract left it discretionary with the vendee whether he would consummate his purchase, it imposed no obligation upon him; and as it must be binding upon both parties, or voidable, at the election of either, it cannot be enforced against the vendor. The recital of the contract indicates that it was the intention of Bass to sell, and Gilliland to purchase an undivided moiety of a half section of land: the latter gives his note for the purchase money, and the former undertakes, upon the payment of the note, to make a title as soon as he shall obtain a patent from the government. Had the recital stopped here, there would have been no room for controversy; but the condition of the bond goes further, and provides that if the vendee shall pay his note when the same becomes due, the bond shall remain in full force; "if not, then the bond to be handed over to said Bass, and notes given back to Gilliland." These latter terms are unusual in such contracts, and if literally interpreted, would seem to provide for its rescission. But whether they authorised the vendee to put an end to the contract by failing to pay the purchase money, is a question, which, according to the view we take of the case, need not be decided. We will, however, cite one case in which the facts were somewhat analagous upon this point. In Barbour's ex'rs v. Brookie, [3 J. J. Marsh. Rep. 512,] it was held, that a title bond for land, to be paid for by instalments, containing the following clause,

"but if said vendee fail to make good the above payments, in that case the above tract of land to revert back to the vendor," did not authorise the vendee to surrender the land and rescind the contract at his option. The clause was considered merely as declaratory of the law, viz: if the purchase money was not paid, the vendor should hold the title. Conceding to the last clause in the condition of the bond, the effect that is claimed for it by the vendor, and still it cannot avail him as a defence. The evidence recited showed that neither party considered the contract at an end when the money became due, but acted upon the hypothesis that its obligation still continued. What passed between them at that time, amounted to a re-affirmation, and took away the right of rescission under the contract, if it was provided for by its terms. It was a renewal of the vendee's promise to pay his note, and of the vendor's undertaking to make a title, if the money was paid within the time given; and neither party can absolve himself from a performance at pleasure, but to give to either this privilege, it must appear that the other was in fault. We have already seen that no fault is attributable to the vendee.

Bass, in his answer, admits that he has sold two hundred and twelve acres of the half section to Carter, which is of about equal value with the one hundred and eight acres, to which he still retains the title. It was clearly competent, if the complainants so elected, for the chancellor to have ordered a conveyance of the latter part of the land, without requiring a division first to be made according to quality and quantity. The sale made to Carter, and the affirmation of the equality of value of the respective parcels, forecloses all objection on this point by Bass; for in this respect he cannot be prejudiced, but the decree may be beneficial to him, as it relieves him from accountability to Carter, which would result from an interference with the sale to him.

The bill, we have seen, alleges a tender of the money by Gilliland, or that which is equivalent, when the same became due; and this allegation is abundantly proved. It also goes further, and offers to bring the money into court, or pay the same to Bass, as the order or decree of the court may direct. This, we think, in the absence of all proof to show that Gilliland, in his life-time, or his heirs since his death, have not kept the money ready to pay whnever required, is sufficient to have authorized the chancellor to relieve the complainants from the payment of interest. The

vendor voluntarily refused to receive the money, and it was the duty of the vendee to have retained it, and if he has done nothing more, it would be unjust to charge him with the payment of interest.

It is insisted that the complainants cannot claim relief upon the ground that a tender was made by the vendee; because the money was not brought into court and deposited at the time the bill was filed. It may be conceded that such was the law in respect to pleas of tender to an action at law; but the analogy of such a plea to the bill in the present case, is not perceived. In the suit at law the plaintiff is seeking to recover a sum of money, a part or all of which, the plea admits to be due and offers to pay. Here, the vendor is seeking to dispossess the vendee of a tract of land which he had previously sold him, upon the ground that he had not paid for it according to his contract; the vendee goes into equity, insisting that the money was duly tendered by him, and refused, expressing a readiness and willingness to pay it as the court may direct, and praying a specific performance of the contract. The bill seems to us to go sufficiently far, quite as far as is usual, where a similar object is sought to be accomplished. If the vendee had paid the money into court, and the rules applicable where a plea of tender is interposed, were to govern, the vendor might have taken it out, and either accepted it in full satisfaction of the purchase money, or proceed in his action at his option. [2 Arch. Prac. 203–4.] And this, although the vendor had been incapable of making a title according to his contract. To prevent the possibility of loss to the vendee, we think it most proper that he should retain the money in his hands, subject to such order as the court might make. If the money should not be forthcoming upon the requisition of the chancellor, it would be entirely competent to dismiss the bill, or so dispose of the entire case as to protect the rights of all parties.

It remains but to add that the cause has been disposed of, according to the principles we have laid down, and the decree is consequently affirmed.

THE PLANTERS' AND MERCHANTS' BANK OF MOBILE v. WILLIS & CO.

1. On the trial of the right of property upon a claim interposed under the statute, the court have a discretion in directing the form of the issue; *but it would seem*, that the only proper issue in such cases is an affirmation on the part of the plaintiff, that the property levied on is subject to his execution, and a denial of that fact by the claimant.
2. *Semble;* where the mortgagor has such an interest in the property as may be levied on and sold, the most appropriate step for the mortgagee to take, in order to protect his rights, is, to resort to chancery, that the interest of the mortgagor may be ascertained, and separated from that which he asserts.
3. Where the plaintiff, under the coercion of a court of law, to elect whether he will proceed in that tribunal or in chancery, dismisses his suit in equity for the same identical cause; he cannot on writ of error brought to revise the judgment in the case against him at law, insist that the forced dismissal of his suit in equity was irregular. That proceeding did not enter into, or in any manner affect the judgment in question.
4. The right to continue a cause, the sufficiency of the showing for that purpose, and the amendment of the pleadings, are submitted to the discretion of the primary court, to be exercised with a view to the promotion of justice; and its decision in such case is irreversible on error.
5. The claimant of property to make out his title, offered in evidence a mortgage, which had become absolute; he also adduced his own affidavit, admitted by the consent of the plaintiff, stating that R M was a subscribing witness, to a conveyance of the property in question, made by the defendant in execution to the claimants. The mortgage produced was attested by R M; Held, that the mortgage was *prima facie* the *conveyance* to which the affidavit referred; and if the affidavit was insufficient to identify it, evidence was admissible to show, that R M, who is named in the affidavit, is the same who attested the mortgage, and that but one mortgage was executed to the claimant.
6. The retention of the possession of a chattel by the mortgagor, is entirely consistent with the nature of the security. But if the mortgagor retains the possession for an unreasonable length of time after the mortgage is forfeit, this may warrant the inference that the debt was paid, or that the mortgage was held up as a protection for his property against the demands of creditors. Yet in such case, it cannot be assumed as a conclusion of law that the mortgage is fraudulent.
7. An assignment made by one partner *in his name*, of a note payable to the firm, does not transfer the *legal* interest so as to authorise the assignee to sue *at law* in his own name; yet as the authority of the partner will be presumed, a right

to the note, and as an incident to it, all securities for its payment, passes to the assignee, who may maintain an action on the note in the name of the payees.

8. A witness may testify that a sum of money was paid in a draft on a foreign bank by a third person to one of the parties in the cause, although the draft was not produced at the trial—the positive knowledge of the witness, and the presumption that the draft has been taken up by the bank, are sufficient reasons for dispensing with its production.

9. Where a witness states that he purchased property for another, under the authority of a letter from the latter, he cannot be permitted to give parol evidence of the contents of the letter, until he has satisfactorily accounted for its absence.

10. A surety of the claimant of property in a bond given for the trial of the right, cannot refuse to give evidence for the plaintiff in execution, on the ground of his suretyship.

11. The interest of a mortgagor in possession of personal property, may be sold under execution before the mortgage is forfeited; but if the debt intended to be secured, becomes due, and the mortgage provides that in such event, the mortgagee shall be entitled to the immediate possession of the property, or be authorized to sell the same, then he may assert his claim, put an end to the mortgagor's possession, and if the transaction is *bona fide*, the debt really due, and lien of the mortgage continuing, the property cannot be condemned to satisfy the execution.

12. Where the payees of a note, secured by mortgage, have undertaken to transfer the same, and received part of the consideration agreed to be paid therefor; if they, as mortgagees, have a legal right to the possession, they may interpose a claim to the property, (under the statute,) when levied on by execution; and though they receive full payment for their assignment pending the cause, the assignees may continue the litigation in the names of the assignors.

WRIT of Error to the County Court of Lowndes.

The plaintiff in error recovered a judgment against Robert Lowe and others, in the circuit court of Mobile, and caused a *fieri facias* to be issued thereon and placed in the hands of the sheriff of Lowndes, which among other slaves, was on the 15th June, 1842, levied on the following, as the property of Lowe, viz: Jack, Chapman, Tom, Susan, Lucy, and Cæsar. These slaves were claimed by Mitchell G. Hardy, as the agent of the defendants in error, and bond given to try the right according to the statute.

In framing the issue, the parties could not agree; but after several decisions by the court upon demurrers to the counts, pleas, replication and rejoinder, (as they are called) an issue was made up to try whether the slaves in question were liable to the satisfaction of the execution, and if so, whether the interest of Lowe

was not an equity of redemption, coupled with the possession, &c.; the claimants being mortgagees.

Several exceptions were taken by the plaintiff in execution to the ruling of the circuit court. 1. It appears that the plaintiff had filed his bill in chancery, in which he proposed (in the opinion of the court) to litigate the same matters in controversy in this cause; and thereupon, on motion of the claimants, the court compelled him to elect whether he would proceed in equity, or at law; and under such coercion he dismissed his suit at law. 2. After the plaintiff had signified his election of the causes, upon an assurance by the claimant that he was ready for trial, the latter made an affidavit for a continuance, on the ground that a material witness was absent, and stating the facts he expected to prove by him. The court adjudged the affidavit sufficient, and offered to continue the cause, unless the plaintiff would admit that the witness would testify to the facts stated. 3. The court permitted the claimant to amend the issue on his part, after it had been made up, and the parties had announced themselves ready for trial, and the cause was about to be submitted to the jury.

The cause being put to the jury, the plaintiff proved, that the slaves in question were in claimant's possession at the time of, previous, and subsequent to the levy of the execution, also the separate value of each, and there rested the case.

The claimants then offered a deed dated 11th March, 1840, by which the slaves in controversy were conveyed to them, to secure the payment of a note of $4,369 27-100. It was therein stipulated, that if the note with the interest thereon, should not be fully paid off by the 1st March, 1841, then the mortgagees were invested with power to take possession of the slaves, and to sell them at public outcry, &c. The execution of the mortgage was supposed to be proved, by the affidavit made by the claimants for a continuance. So much of the affidavit as is material, reads thus: "that Reuben Mundy is a material witness for claimants and that he cannot go safely to trial without him; that by him they will be able to prove the execution of a conveyance, made by said Lowe to claimants, of the property levied on, and that the debts mentioned in said conveyance are genuine and *bona fide*: said witness was a subscribing witness to the same." To the mortgage offered in evidence, the name of R. Mundy appeared as an attesting witness; but the plaintiff objected, that the facts

stated in the affidavit did not identify it or prove its execution. Thereupon, the claimant introduced the defendant in execution, who testified that Mundy, mentioned in the affidavit, was the same person who subscribed the mortgage as a witness; that he never made but one mortgage to the claimants, and that was the one now before the court. The plaintiff objected to the admissibility of this evidence, but his objection was overruled. The plaintiff then made the following objections to the admission of the mortgage. 1. Because it appeared that the subscribing witness lived in the county where the cause was tried, was then at home, and no cause shewn why his testimony, either through the affidavit or otherwise, had not been laid before the court in a more perfect form, in order to establish the execution of the mortgage, and ancillary proof from another source, was inadmissible. 2. That as the mortgage had become absolute and forfeited about twenty three months previous to the levy of the execution in the present case, and the property embraced by it during all that time, without any effort to sell the same, or otherwise foreclose the mortgage, or assume the possession, or excuse for the failure to do either of these acts, remained with the mortgagor, the lien of the claimants was entirely lost. 3. That the interest of a mortgagee, who has never had the possession of personal property, cannot be regarded and protected, on the trial of the right of property. All which objections were overruled, and the mortgage read to the jury as evidence.

Evidence was also adduced to show, that the note had been indorsed by A. Willis to James Reid; that the indorsement proposed to transfer not only the note but the mortgage also. The defendant in execution also stated, that as the agent of Reid (who was his brother in law,) he had made a payment to the claimants, by transferring to them a draft or certificate of deposit, on a bank in Edinburg; and that he was appointed an agent by a letter written to him by Reid, which was in his possession at his residence in Lowndes county. To the admission of this evidence, the plaintiff objected. 1. Because the assignment was made by A. Willis alone, and did not identify the mortgage. 2. Because the draft or certificate of deposit should be produced, or its absence accounted for. 3. Because the letter under which Lowe acted was evidence of a higher grade than his oral statement.—

But all these objections were overruled, and the evidence adjudged to be proper.

The plaintiff then showed by the witness last examined by the claimants, that as the agent of Reid, he had satisfied the claimants, their debt and mortgage, as follows, viz: on the — day of September, 1840, he paid $1,906; in the winter of 1841, $1,660, and in February, 1843, $750.

The plaintiff proposed to examine Mitchell G. Hardy, for the purpose of rebutting and explaining what had been proved by the claimants; but he objected to being examined, on the ground that he was a party to the bond which had been executed upon the claim of property; and his objection was sustained, and the plaintiff denied the right of examining him as a witness.

The evidence being closed, the plaintiff's counsel moved the coart to instruct the jury as follows: 1. That immediately after default in the payment of the debt, the claimants had the right to take possession of the mortgaged property, and to sell the same in the manner prescribed by the mortgage, and if they voluntarily permitted the mortgagor to remain in possession of the slaves for fifteen months or more, and until the execution was levied, without any effort to take them, or otherwise collect their debt, knowing that he was insolvent; such delay had the effect to destroy the lien of the mortgage as against the plaintiff's execution. 2. That, if under the circumstances supposed in the first instruction prayed, the mortgagor retained the possession of the slaves in question, James Reid became the assignee of the note and mortgage, and discharged the latter as testified by his agent, such assignment did not create a lien which can be enforced or protected on the trial of this case, against the plaintiff's in execution. 3. Conceding that Reid's right to the note and mortgage is unquestionable, and giving full credence to the evidence in respect to the assignment to him, and the payment by his agent to the mortgagees, yet his interest cannot in this proceeding be protected. 4. If the claimants have been fully paid their debt, and had relinquished and abandoned all right to proceed on the mortgage which had been executed to them, then the property in dispute was subject to condemnation to satisfy the plaintiff's execution. These instructions were refused; and the court said, that if Reid had fully paid to the claimants, the amount of the debt secured to them by the mortgage, and the latter had assign-

ed the same to him, then he had a right to use their names in defending his interest. 5. That under the issue, the plaintiff was entitled to a verdict of condemnation for the equity of redemption, at least in the slaves in controversy, be the value of the property what it may; which instruction was declined. But the court instructed the jury, that a finding by them of the value of the property and the amount of the mortgage lien remaining, if any, would be a sufficient finding under the issue, that such finding would authorise a judgment condemning the property to sale under the execution, "to all which refusals of the court to charge the jury, as well as to all the proceedings, opinions and decisions on the various questions of evidence presented to the court as above stated, the plaintiff in execution excepts," &c. The jury by their verdict ascertained the value of each of the slaves, and the judgment entry proceeds thus: "we further find an unsatisfied mortgage in favor of Anderson Willis & Co., or their assigns, for three thousand one hundred and seventy-six 81-100 dollars, but it is considered by the court that the equity of redemption coupled with the possession shewn, and admitted by the pleadings to exist and remain in the defendant in execution, Robert Lowe, are subject to sale under the said plaintiff's execution, and that the slaves levied on as stated on said plaintiff's execution be sold accordingly," &c.

R. Saffold, with whom was G. W. Gayle, for the plaintiff in error, made and argued at length the following points. 1. The plaintiff should not have been put to elect between this cause and the suit in equity; the nature and object of the cases, did not authorise it; and if it was not a case in which an election of suits could be coerced, the requisition was premature. as the defendants had not answered the bill. [3 Mad. Ch. Rep. 20; 5 Id. 18; Eden on Inj. 27–8; 1 Smith's Ch. Prac. 561–2–3; 1 Ala. Rep. N. S. 708.]

2. The court erred in its decisions in respect to the framing of the issue, and the permission to amend the same. [Aik. Dig. 277.]

3. The affidavit for a continuance, setting forth the facts expected to be proved by Mundy, was insufficient to establish the due execution of the mortgage, and the defects were not, nor

could be supplied by the evidence of Lowe. [1 Starkie's Ev. 331; 1 Phil. Ev. 473–4; 3 Id. 1293–4, C. & H's ed.]

4. Parol evidence was inadmissible to show, that Lowe was the agent of Reid, in the purchase of the debt and mortgage from the claimants—the letter under which he acted, was higher evidence. [3 Phil. Ev. 1208, C. & H's ed.]

5. Hardy, though he had executed the bond for the trial of the right of property, was clearly a competent witness for the plaintiff. He was called on to give evidence against his own interest; but if it were otherwise he could not disqualify himself.

6. The equity of redemption and possession of the slaves of Lowe, were subject to be sold under the execution, and an inquiry could not be made into the state of the accounts between mortgagor and mortgagees. [Purnell v. Hogan, 5 S. & P. Rep. 192; McGregor et al. v. Hall, 3 S. and P. Rep. 399; Perkins and another v. Mayfield, 5 Porter's Rep. 182; Williams and Battle v. Jones, 2 Ala. Rep. N. S. 314.]

7. The facts proved in respect to the mortgage, the continuance of the mortgagor in possession, without any attempt on the part of the mortgagees to sell the slaves, or otherwise interfere with them, make it fraudulent in law, and consequently inadmissible as evidence.

8. The mortgage being void as against the mortgagees, cannot be sustained for the benfit of Reid, conceding that he became an assignee in good faith.

9. If the mortgagees have been fully paid and have no interest in the mortgage, the claim interposed by them cannot be sustained merely for the benefit of Reid, who although he may have satisfied the debt, is not an assignee which a court of law will protect.

T. Williams, for the defendants in error, insisted, that the circuit court properly compelled the plaintiff to elect whether he would proceed in this case, or his suit in equity; but even an error in this respect is immaterial, as it cannot at all affect the regularity of the judgment or the proceedings previous thereto.

In respect to the issue formed, it was clearly correct. [Perkins and another v. Mayfield, 5 Porter's Rep. 182.] And though the court did not, in so many words determine, that the equity of redemption and mortgagor's possession, were subject to the exe-

cution, yet such was in legal effect the decision, both in dictating the issue, and in charging the jury.

The facts stated in the affidavit for a continuance, were clearly sufficient to prove the execution of the mortgage; especially when connected with the evidence of Lowe, which identified the mortgage as the only paper of the kind which Mundy attested, and the one to which the affidavit referred.

The objections to the mortgage did not make it invalid in law, they addressed themselves rather to the jury than the court; but do not show that it became inoperative as a lien.

Hardy might, if he thought proper, have submitted to be examined as a witness, but as he was interested in the result of the cause, he could not be used as a witness against his consent.

There was no necessity for producing the letter of Reid to Lowe, authorising him to purchase of the claimants the debt and mortgage. The act had been consummated and not dissented from by any of the parties; and this was sufficient to dispense with the production of any written proof of authority.

The fact of the continued possession of the mortgagor, after the forfeiture of the mortgage, did not affect the lien which the mortgage created, either as it respects the claimants or their assignee. And it was entirely competent for the claimants, on behalf of Reid, to assert in their own names (as the parties in whom the legal title is vested) a right to the property; the more especially as Reid had not fully paid them, until after the assertion of their claim.

COLLIER, C. J.—When a claim to property, levied on by execution, is interposed in the manner prescribed by the statute, the court before which it shall be pending, is directed to require the parties to make up an issue under such rules as it may prescribe, for the trial of the question of right. [Ala. Dig. 167–8.] The form of the issue, is a matter within the sound discretion of the court, and is not ascertained by any certain rules; consequently the affirmations and denials of the parties preparatory to a trial by jury, are not the appropriate subjects of a demurrer. If the parties cannot agree, the court should dictate the terms of an issue, adapted to the case to be tried. This is all that can be required, and where this is done, neither party can object on error, that he was required to join in an issue expressed in words

different from what he proposed. The opposite conclusion, would go to take from the court the discretion which the statute confers, and occasionally embarrass its action, without benefit to any one.

In the present case, the issues were sufficiently broad, to tolerate the admission of any evidence, to show that the claimants had such a legal title to the property in question, that it could not, against their consent, be sold to satisfy the plaintiff's execution; and at the same time, they were so framed as to allow the plaintiff to prove that the defendant in execution had such an interest in the slaves as was the subject of a levy and sale for the payment of his debts. In fact it would seem, that an affirmation on the part of the plaintiff, that the property levied on was subject to his execution, and a denial of that fact by the claimant, was the only proper issue in all cases. We are much inclined to question what was said in Perkins and Elliott v. Mayfield, [5 Porter's Rep. 182,] in respect to the form of the issue, where the possessory right of the mortgagor and his equity of redemption, is sought to be condemned against a claim interposed by the mortgagee. Where the mortgagor has such an interest as may be sold under execution, the mortgagee never should take a step so hazardous as to assert his claim at law; and if he does, and the plaintiff, as he may, affirms that the property is liable to his execution, it will be competent for him to show that the mortgage is invalid, or that the interest of the mortgagor may be levied on and sold. To prevent such a result, it is in general, the safer course for the mortgagee to seek the interference of chancery "for the purpose of ascertaining and separating the interests of the mortgagor" from that which he asserts. [Williams and Battle v. Jones, 2 Ala. Rep. 319.]

In respect to the order of the circuit court, requiring the plaintiff to elect, whether he would proceed in the trial at law, or in a suit in equity, which he had instituted, involving the same matter of controversy, we think its regularity is a question not now presented for revision. That order is inconclusive of the cause in chancery, until that court shall act upon it, and give effect to the forced election of the plaintiff. This being the case, it is not the subject of revision by an appeal or writ of error; besides, if it were, the writ of error which has been sued out, does not complain of it, but seeks only the reversal of the judgment on the trial

of the right of property. The direction in regard to the suit in equity, could not in the slightest degree have affected the result of the case before us; whether right or wrong, was wholly immaterial to its decision. The reversal of the judgment will not annul the order of election; that will still continue operative as far as the *court of law could make it so*, until it is set aside by some direct action.

But the plaintiff cannot be irreparably prejudiced by the order of the circuit court; if erroneous, (as we incline to think it is,) it may be vacated by *mandamus* addressed to that tribunal, or the court of chancery. And the latter may be required to proceed as if no election had ever been made; and this, although a decree dismissing the bill may have been rendered under the influence of the plaintiff's election. These conclusions seem to us to result so clearly from the nature of the subject, that they do not need the aid of argument to illustrate them.

The continuance of a cause and the amendment of the pleadings are matters within the discretion of the court; in the decision of which it must always be influenced by the circumstances of the particular case. And though the court may exercise its discretion unwisely, it is not competent for an appellate tribunal to revise the matter so as to administer more complete justice. The fact that the plaintiff had elected to proceed at law, did not take from the court the right to entertain a motion to continue the cause; nor did an announcement by the claimants, that they were ready for trial, impair, to any extent, its powers in respect to the formation, or modification of the issue. It is always competent for the court to permit a party to withdraw his assent to proceed to trial at any time before it is entered upon, and also to allow the allegations of the parties to be changed, even so as to require different proof. The court, will however, take care that the opposite party shall have ample time to prepare for the modified state of the case.

The question of the sufficiency of the *affidavit* for a continuance cannot be here considered: the discretionary powers of the circuit court, we have seen, make its decision conclusive upon every point relative to the subject. It was, however, a fair matter of inquiry before the jury, what facts did the affidavit establish. We think the affidavit *prima facie* identified the mortgage made by Lowe to the claimants. True, it does not describe it

by its technical designation, but says, in general terms, that Reuben Mundy was a subscribing witness to a conveyance of the property in question, made by the defendant in execution, to the claimants. A mortgage is certainly a species of conveyance, although subject to a condition, by the performce of which it becomes void; that offered in evidence is attested by R. Mundy and embraces the slaves which were levied on, and according to every reasonable intendment, must have been the conveyance referred to by the claimants. The presumption cannot be indulged, that the property was transferred by two distinct conveyances to the claimants, and even if such were the fact, the general description of the mortgage in the affidavit, would warrant its admission as evidence.

But if the facts stated in the affidavit were insufficient to identify the mortgage and establish its execution, the additional testimony adduced, proved that the Robert Mundy mentioned therein, was the person who attested the mortgage in question, and that it was the only one executed by the defendant in execution, to the claimants. This evidence, it seems to us was unobjectionable. It was not offered to prove that, which the subscribing witness was alone competent to establish, but its tendency was to show that the mortgage was the conveyance to which the affidavit alluded: this being shown, the facts which it was admitted Mundy would prove, were entirely sufficient to make the mortgage evidence. The testimony of Lowe, instead of being intended to take the place of Mundy's, was intended to give point and direction to the facts disclosed in the affidavit, and if necessary to strenghten them.

The fact that the mortgagor of personal property retains possession, is not an act fraudulent in law, nor evidence of fraud, where the conveyance stipulates that the possession shall remain with him. [United States v. Hooe, et al. 3 Cranch's Rep. 75.] It may be laid down generally, that in the case of a mortgage of chattels, the retention of possession by the mortgagor, up to the period of forfeiture, is entirely consistent with the deed, although there is no express stipulation to that effect; and of consequence it does not make the security *prima facie* fraudulent. [D'Wolf v. Harris, 4 Mason's Rep. 515; Barrow v. Paxton, 5 Johns. Rep. 258; Haven v. Low, 2 N. Hamp. R. 13; Dickinson v. Cook, 17 Johns. Rep. 334; Bissell v. Hopkins, 3 Cow. Rep. 166; Holmes,

et al. v. Crane, 2 Pick. Rep. 607; Conard v. The Atlantic Trust Co. 1 Peters' Rep. 449; Claybornes v. Hill, 1 Wash. Rep. 177; Magee v Carpenter, 4 Ala. R 469.] The correctness of these propositions is not controverted, but it is insisted that it was incumbent upon the claimants, upon the default of the mortgagor to pay the debt by the day stipulated, to take immediate possession of the slaves in controversy; and that the failure to do so, without a sufficient excuse therefor, rendered the mortgage fraudulent in law, and therefore void. It may be conceded, that it is in general the duty of the mortgagee to avail himself of his security, when the mortgage becomes forfeit, and if he delays the institution of a suit for an unreasonable time, or fails to possess himself of the mortgaged property, the inference will be, in a controversy between himself and a stranger, that the debt has been paid; but this is a mere presumption, and may be repelled by evidence. [Dougherty v. Kercheval, 1 Marsh. Rep. 52.]

It is definitively settled in this State, that if the seller of personal property who has made an unconditional bill of sale, retains the possession, the transaction is *prima facie* fraudulent, and to free it from such a legal imputation, as against a creditor of the vendor, the purchaser must show special reasons why the possession did not follow the evidence of transfer. [Hobbs v. Bibb, 2 Stewart's Rep. 54; Ayres v. Moore, Id. 336; The P. & M. Bank of Mobile v. Borland, at this term.] But the same rule cannot be made to apply to a mortgage of personal chattels, after the failure of the mortgagor to pay the debt intended to be secured. Unless the mortgage give such a right to the mortgagee it cannot be exercised by him, but the remedy by which the security is made available, is by suit in equity, where a decree may be obtained for a foreclosure and sale. Where a power of sale is conferred, the mortgagee may, upon default, take possession of the property, if he can do so without committing a trespass. Yet in the first case, if he fails to bring a suit, or in the latter, to take possession immediately, it cannot be assumed as a conclusion of law, that the debt was paid, or the mortgage fraudulent. If the transaction was fair in its inception, it cannot be denounced because the mortgagee has not availed himself of his rights, *secundum stricti juris*. The retention of possession by the mortgagor for an unreasonable length of time, may warrant the inference that the debt was paid, or that the mortgage is held up as

a protection for his property against the demands of creditors. But these are conclusions which may be repelled by proof, that the indulgence of the mortgagee, was compatible with fair dealing, and induced by no intention to favor the mortgagor to the prejudice of his creditors. It must, from the very nature of the case, be a question of fact, for the solution of the jury, what length of time unexplained, would make the mortgagor's possession conclusive evidence of fraud on the part of the mortgagee. [Patten v. Smith, 4 Conn. Rep. 450.]

In Magee v. Carpenter, [4 Ala. Rep. 469,] there was a mortgage of goods for a debt payable by instalments, with power to sell at the happening of the first default. The court say, "As the possession of the mortgagor was consistent with the terms of the deed, no presumption of fraud arises from the mere fact of the possession remaining with him after the execution of the deed; unless such possession continue after the happening of the last default by the failure to pay the last note. Then such possession would doubtless be a badge of fraud." This latter remark may perhaps be misapprehended, and be taken as an intimation, that if the mortgagee omits to avail himself of his security for any length of time after he is authorised to do so, his neglect shall be deemed a fraud upon the mortgagor's creditors. Nothing more was intended to be said, than that the retaining the possession for an unreasonable time, was a mark or sign of fraud in the sense, and to the extent we have already stated.

But if the law required that the change of possession should be instantaneous upon the mortgagor's default, and made its continuance *prima facie* evidence of fraud, and conclusive unless explained, still the mortgage was admissible evidence. In fact, it should be permitted to go to the jury, in order to let in explanatory proof to show its validity was unimpaired.

From the view taken of the point we are considering, it necessarily follows that the court should not, as a question of law, have instructed the jury that the possession of the mortgagor with the mortgagee's permission, destroyed the lien of the mortgage, as against the plaintiff in execution. But all the circumstances and facts should have been submitted to the jury, that they might determine whether the influence of the continued possession, was not outweighed and controlled by countervailing proof. Suppose the mortgagees agreed to receive the in-

terest on the debt at stated times, and give further day for the payment of the principal, or stipulated with a third person for the transfer of the debt and mortgage, upon being paid the amount of it, in instalments or by a certain time, would the mortgage be avoided by such an arrangment. These are questions we merely suggest; as it is unnecessary we will not answer them. The creditors of the mortgagor can be rarely injured by the delay of the mortgagee; for if necessary to enable them to collect their demands, they may go into equity, and enforce a foreclosure and sale of the mortgaged property. [Chambers, et al. v. Mauldin, et al. 4 Ala. Rep. 477.]

It is immaterial in what form the note and mortgage were assigned to Reid, as no assignment could transfer such a legal interest in the mortgaged property, as would enable the assignee to assert a right at law in his own name; and an equitable title might be transferred verbally, especially if the papers were delivered. True, an indorsement of the note in the name of A. Willis alone, would not have authorized the assignee to have maintained an action thereon, yet a sale of the note by A. Willis, would have made him its proprietor in equity, and have entitled him to sue at law in the names of the payees; and the mortgage would have followed the transfer of the note, as a security for its payment. The assignment being made by one of the partners, the legal inference is that it was authorized, and if necessary, it might be intended that it was actually assented to by all. It is perfectly clear, that however considered, the evidence on this point was admissible.

As to the draft upon, or certificate of deposit in some bank in Edinburg, its production could not have been required. The witness testified from his own knowledge that a payment was thus made, and stated the amount of it without reference to the paper; besides the draft or certificate being paid or placed to the credit of the claimants, or their order, (as we must presume) and thus placed beyond their reach, its production, for these reasons, was properly dispensed with. [Planters' and Merchants' Bank of Mobile v. Borland, at this term.]

Whether the defendant in execution was really the agent of Reid in the purchase of the note, or whether his agency was simulated, was an important inquiry for the jury. If he paid the debt with his own means, the property would be discharged from

the mortgage, and of course liable to the plaintiff's execution.—The question then arises, whether the letter under which the defendant in execution professed to represent Reid, should have been produced at the trial. It is laid down that a writing, where one exists, is generally constituted the exclusive medium of proving the transaction to which it relates; and whenever it turns out, either on the direct or cross examination, that a writing exists with regard to a transaction, which the law esteems as the best evidence, it must be produced, or its absence accounted for. If this is not done, all inferior evidence that may have been given, will be stricken out and disregarded. [3 Phil. Ev. C. & H's ed. 1207, *et post.*] This rule, however, it is said, is not universal, and that it is competent, to prove the transaction, that receipts and some other writings are designed to evidence, by the parol testimony of witnesses, without accounting for their non-production. But this can only be done where the witness knows the fact independently of and without reference to the paper. [2 Phil. Ev. C. & H's ed. 547, *et post*, and cases there cited.] But where the contents of *any written instrument*, as such, are sought to be proved, it must be produced, or its absence accounted for. [2 Phil. Ev. C. & H's ed. 549. 3 Id. 1208, 1211.]

In the present case, the letter of which the witness spoke, was the only evidence he had of authority from Reid to purchase the note and mortgage; its contents must have been relied on as proof of his agency, and according to the general rule we have stated, should have been produced. This conclusion seems to us to result so clearly from what has been said, as to relieve us from the necessity of amplifying upon the point.

The fact that Hardy was the claimant's surety, in the bond executed preparatory to the trial of the right of property, did not excuse him from giving evidence at the instance of the plaintiff in execution. He was not a party of record, and his liability was but subsidiary, depending upon a non-performance of the condition of the bond by the claimants; so that even were it conceded, that one could not be required to testify about a matter, where his evidence might subject him to a debt or duty, the witness in question had no sufficient excuse for withholding his testimony. This point was, in principle, determined by Gary, et al. v. Frost & Dickinson, at the last term. That was a suggestion against a sheriff, that he could have made the money on a *fieri facias* with

due diligence. The sheriff proved that an execution in favor of another plaintiff had been levied on the property of the defendant, and a sale thereof made: thereupon the plaintiff proposed to prove by a deputy as well as *surety* of the sheriff, that the judgment on which this latter execution issued had been paid. It was insisted that the witness was not bound to testify, and as he objected, should be excused; but this court held, that the fact that his evidence might be adverse to his interest, would not deprive the plaintiff of the benefit of it.

In Magee v. Carpenter, *ut supra*, it was said that the interest of a mortgagor in possession might, before default, be sold under a *fieri facias* against him; that after default, if the mortgage conferred upon the mortgagee, an immediate right of possession, he had a legal title, which he could assert against the creditors of the mortgagor whose executions were levied on the property. In that case an execution was levied on the mortgaged property, the mortgagee gave bond and security to try the right, and it was held that the levy could not take away the legal right of possession; that the mortgagee could then assert it for the first time, notwithstanding he had hitherto acquiesced in its enjoyment by the mortgagor. Here is an authority directly in point. In the present case, the mortgage gave to the mortgagee the right to take possession of the property in question, and sell it, upon default being made in the payment of the debt intended to be secured; the condition of the mortgage had become forfeit before the execution was levied, and the legal right of the mortgagee complete. Under these circumstances, the mortgagor had a possession during the pleasure of the mortgagee only, together with a mere equity of redemption. So long as the possession was permitted, there was an interest which could be sold under execution, but the possession being terminated, there was nothing left but an equity, which is not the subject of a levy: and the interposition of a claim of property, under the statute, puts an end to the possession, as the case cited indicates.

It then follows, that the mortgagor's interest in the slaves could not, as against the claimants, be sold for the satisfaction of the plaintiff's execution, unless the mortgage was fraudulent, had lost its efficacy, or the debt it was intended to secure was paid off, or otherwise discharged.

Whether, if the claimants had fully divested themselves of all interest in the note and mortgage, previous to the levy of the execution in this case, they could have claimed the property for the benefit of their assignee, it is unnecessary to inquire. The proof shows that although they may have stipulated for a transfer of the note, and received a part of the money before they interposed their claim, yet it was not until some time afterwards that they were fully paid. There is nothing in the record to show that the transfer was complete, until full payment was made; and it can not, in the absence of proof, be intended that such was the case.

Assuming it to be true, that the claimants had a legal interest to defend at the time this proceeding was instituted, there is no pretence that it was not rightly commenced. The receipt of full payment from Reid subsequently, does not affect the cause, but the assignee may use the claimant's names for the protection of interests, which by contract he had derived from them. It is needless to make a particular application of the law upon this point, to the charge prayed, as the cause must be sent back for another trial.

This view is decisive of the many points in this cause which we have felt it our duty to notice. Without attempting to recapitulate, it has been shewn, that the circuit court erred, at least, in permitting parol evidence of the letter from Reid to Lowe, and in excusing Hardy from giving evidence, when called by the plaintiffs.

The consequence is, that the judgment is reversed, and the cause remanded.

SELMA AND TENNESSEE RAIL ROAD COMPANY v. TIPTON.

1. An action will lie to recover a subscription for stock in an incorporated company, although the charter declares, that upon the failure of the subscriber to pay any requisition made by the directors thereon, his stock "shall be forfeited to the company, with the instalments which may have been paid, &c." The right to claim the forfeiture, and the proceedings consequent thereupon, are merely a cumulative remedy.
2. In an action by a corporation, the declaration need not *specially* allege a compliance with every particular circumstance relating to its organization, which is required, in order to its becoming invested with the privileges and powers conferred by its charter. Although it may be necessary to prove these matters specially, the allegation may be more general.
3. A regular subscription for shares in the stock of an incorporated company, whether made previous to its organization or not, if it organizes as provided by the charter, imports in itself a sufficient consideration, and may be declared on as the foundation of an action.
4. *Semble:* Presumptions are applicable as well to corporations as individuals; persons acting publicly as officers of the corporation are presumed rightfully in office; and the performance of all necessary steps presumed, in order to make a corporate act legal.
5. Where the act creating a corporation provides, that its members, or they who may become such, shall organize before their corporate existence is complete; in an action to recover the price of stock subscribed for, previous to their organization, the defendant by an appropriate plea, may throw upon the plaintiff the burthen of showing a compliance with the requirements of the charter.
6. *Semble*: That a legislative charter, or rather the privileges and powers conferred by it, cannot be adjudged void and inoperative in an indirect proceeding; but this can only be done in a proceeding instituted at the suit of the State, with a view to such object.
7. Not only estoppels, technically so called, but estoppels *in pais*, operate both for and against corporations.
8. Where the charter requires that a subscriber for stock in an incorporated company, shall pay five per cent. on the amount at the time of his subscription; if instead of making the cash payment, he gives his note therefor, participates in the organization of the company, becomes one of its directors and pays his note; he cannot afterwards insist as a defence to an action to recover an instalment, that he did not pay the *five per cent.* at the time of subscribing.
9. A subscriber for stock in an incorporated company, to whom the charter does not accord that privilege, cannot withdraw from the company, and thus avoid the liability to pay for it.

Selma and Tennessee Rail Road Company v. Tipton.

WRIT of Error to the Circuit Court of Dallas.

This was an action of *Assumpsit*, by the plaintiff in error, against the defendant. The declaration contains four counts. The first count avers that the plaintiff was created a coporation by the name in which it sues, by an act of the General Assembly, approved the 22d December, 1836, and in virtue of an organization as therein provided for; that the object of the corporation was the construction of a rail-road, from Selma, in the county of Dallas, to the Tennessee river, on the line between Alabama and the State of Georgia, in the direction of Ross' ferry, or some point below that ferry on the Tennessee river. *Further*, in consideration, that the plaintiff would permit the defendant to become a member of the corporation, and proprietor of three hundred shares of one hundred dollars each, the latter promised he would pay to the former, thirty thousand dollars, in the following manner, to wit: five dollars on each share, at the time of subscribing; which sum was paid: and the remainder at such time as the directors of said company should appoint, in instalments, not exceeding ten per cent. upon twenty days notice being given in a newspaper, of each requisition. It is also averred, that by plaintiff's permission, the defendant did subscribe for three hundred shares at one hundred dollars each, in conformity to the provisions of the act of incorporation; and that since the time of subscribing therefor, and organizing the company, to wit: on the 20th day of October, 1838, at, &c. aforesaid, the directors did require an instalment of two per cent. to be paid on the defendants stock, on the first day of December, thereafter, and gave twenty days notice of the requisition in the Selma Free Press, a newspaper printed and published in said county; which instalment amounted to six hundred dollars—of all which, the defendant had notice, &c., yet he hath not paid, &c.

The second count, omitting what is stated in the first, of the manner in which the plaintiff became a corporation, after averring its organization, alleges that the defendant subscribed for shares of stock, and became a member of the company substantially, as does the first count. It also avers in the same manner, that a requisition for an instalment of five per cent. on each share, was made by the plaintiff, of the defendant, on the 13th March, 1839, at, &c. aforesaid, to be paid on the 5th April thereafter; that

publication was made for twenty days in the Selma Free Press; of all of which, the defendant had notice, but has not paid, &c.

The third count, after stating in the same manner as the second, the defendant's subscription or contract for stock, and its terms, alleges, that the defendant did become a member of the corporation, and proprietor of three hundred shares, in conformity with the provisions of the act of incorporation. It is then averred, that on the 24th day of June, 1839, a requisition was made of an instalment of five per cent. to be paid on the first of December, thereafter; that publication was made in the Selma Free Press, &c. for twenty days—of all which, the defendant had notice, but has not paid, &c.

The fourth count is for money lent, and advanced, &c. To the three first counts, the defendant demurred severally, and to the fourth, he pleaded *non-assumpsit and nul tiel* corporation. The demurrers being sustained, the plaintiff declined amending his declaration, and the cause was thereupon submitted to a jury upon the issues of fact, to the fourth count. On the trial, a bill of exceptions was sealed, at the instance of the plaintiff, from which it appears that the plaintiff offered as a witness an individual who was one of the commissioners mentioned in the act of incorporation, was secretary to the board, and afterwards of the company, who testified that the commissioners, shortly after the passage of the act of incorporation, opened books of subscription to the capital stock of the company, as directed therein. On the first two days, the sum of three hundred thousand dollars were subscribed by several individuals, among whom the defendant was a subscriber for three hundred shares, amounting to thirty thousand dollars. The book of subscription first stated the object proposed, with a written promise in these words: "We the undersigned agree to pay the sums annexed to our respective names, towards the capital stock of the Selma and Tennessee rail road company, in conformity with the provisions of the act incorporatidg said company." Immediately under which were drawn four columns, in the first of which was set down the day of the month and year; in the second, the subscribers for stock wrote their names; in the third the number of shares subscribed; and in the fourth, the aggregate sum to be paid therefor.

The five per cent. on the stock of each subscriber was in a few instances only, paid in cash; but notes were taken by the com-

missioners for the amount payable to themselves. The defendant was one of those who, instead of paying cash, gave his note, which he has since paid. During the time the books were open, there was no effort to conceal the manner in which the business was transacted, and all persons had opportunities of being informed of it. The notes, instead of the cash, were taken for the convenience of the subscribers as cash, inasmuch as the company had no use for money at that time. After the supposed organization of the company, hereafter stated, all these notes were transferred by the commissioners to the company, and the most of them, were paid out by the company to the contractors who had undertaken to do work for them in reference to such a mode of payment. And the commissioners also paid over to the company the cash they had received at the time of subscription. At a meeting of the commissioners previous to that holden for the purpose of organization, they were of opinion that the company might organize under the charter; and five hundred thousand dollars being subscribed, and five per cent. thereon paid in cash and notes, they accordingly gave notice by advertisement in a newspaper, that an election of nine directors would be made by the company at a time and place designated. Pursuant to the notice, an election was holden—a majority in interest of the stockholders being present in person, or by proxy, and nine directors were chosen to serve for one year. At this election, the defendant and a majority of the commissioners were present, and the former joined in the proceedings, and actually voted. The directors thus elected, chose a President from among themselves, and continued the prosecution of the work by collecting materials and making contracts for grading, &c., and did grade twenty-seven miles of the road; collected money from the subscribers and made payments to the contractors, for work done, &c. and in the prosecution of the business, contracted debts to the amount of about forty thousand dollars more than has been paid. That the work on the road has been suspended in consequence of the failure of the stockholders to pay up their subscriptions; and the company has no means of paying their debts, unless a judgment for the stock can be enforced. That a considerable portion of the five per cent. required at the time of subscription was still unpaid, and due from insolvent persons.

An annual election for directors was holden in 1839, and it was

the last; since which time, the directors then chosen, have continued in office. In 1838, the defendant was elected a director, and acted as such, and during the continuance of his appointment paid off the note which he had given to the commissioners for the payment of five per cent. on his stock; afterwards, during the same year, he declared to the directors that he forfeited his stock, and would have nothing more to do with the company; and never afterwards attended.

On the 13th of March, 1839, a call was made, under a resolution of the board for the payment of five per cent. on each share, on the 15th April next thereafter; and on the 24th June, 1839, another requisition was made for the same amount, on the 1st December next thereafter. In both instances, twenty days notice was given by publication in a newspaper, but neither requisition had been paid by the defendant.

The stockholders held the first election of directors under an assurance from the commissioners that the stock had been subscribed and the first five per cent. paid as required. The plaintiff read the act of 1841, to the jury, and offered to prove that the notes so received by the commissioners answered the purposes of the company as well as cash, which evidence was rejected by the court, and the plaintiff excepted.

Just as the trial was entered upon, the plaintiff's counsel gave notice to the defendant's counsel, to produce on the trial, a certificate of stock, which the defendant had received at the time he paid the note given to the commissioners. The defendant lived eight miles from the place of trial, and did not go home while it was progressing: on the next day, but before the trial had closed, the plaintiff proposed to ask defendant's counsel if he had not the certificate in his possession; but the counsel making oath that he knew nothing of it, except as derived from the defendant in the character of counsel, the court refused to compel an answer to the question. The plaintiff then proposed to prove that a certificate of stock had been given to the defendant at the time he paid his note, given for the five per cent. but this as well as a proposition to prove its contents, was refused by the court. To all which the plaintiff excepted.

The court charged the jury, that before the company could be organized there must have been five per cent. on the five hundred thousand dollars subscribed, paid in gold or silver, or its repre-

sentative; and if this was not done it was not a legal corporation, and the plaintiff could not recover of the defendant, unless he was estopped by his own acts. That he was not estopped by a knowledge of the manner in which the instalment was paid; by attending, acting and voting at any meeting of the stockholders or directors, either previous, at, or subsequent to the supposed organization of the company.

The plaintiff's counsel prayed the court to charge the jury as follows, that as by the charter the commissioners are directed to supervise the subscriptions, and to see to the performance of the conditions precedent to the organization of the company, and the first election of the officers was held under their authority, &c., the organization must be considered to have been properly done, unless the State interpose; and the defendant cannot show the illegality of the acts of the commissioners as a defence. Which charge was refused: *Further*, that if the defendant was aware, that much the greater part of the five per cent. due on subscription was paid in notes, and himself and the other subscribers, with this knowledge, accepted the charter; gave his note which he paid; attended and acted as a stockholder and director, he cannot insist on the failure to make the cash payment as a defence to the action; which charge was also refused. *Again*, if the defendant has paid any instalment since the supposed organization, and received a certificate of stock, then he cannot successfully defend this action on the ground that the company was not legally organized. Which charge the court considered abstract, and consequently refused to give it. *Also*, that the commissioners were the agents of the State, and if they received notes previous to the organization of the company, for the instalment due upon subscription, the defendant cannot resist a recovery upon proof of that fact, although the commissioners, in this respect, exceeded their authority. That the third section of the charter, only fixes the time when the first instalment was due, and does not make its payment before the election of directors an indispensable prerequisite; which charge the court refused to give. *Again;* that if there was an organization of the company in fact, and the transaction of business as a body corporate for several years, the defendant cannot object that the organization was irregular; and this although the company, by mismanagement of the commissioners may have commenced business before the requirements

of the charter had been complied with; which charge the court refused to give. One other charge was prayed and refused, which it will be unnecessary to state, as it is in substance a repetition of several of the others already recited. The questions of law arising upon the bill of exceptions are duly reserved. Under the ruling of the court, the jury returned a verdict for the defendant, and a judgment was thereupon rendered.

DARGAN and EDWARDS, for the plaintiff in error.—1. The demurrer to the declaration was improperly sustained, as the fact of organization is sufficiently alleged. [3 Ala. Rep. 660; 1 Id. 241; 5 Mass. Rep. 80; 10 Id. 327; 5 H. & Johns. Rep. 122; 1 Johns. Cases, 132; 14 Johns. Rep. 238; 2 Bibb's Rep. 577; 4 Rand. Rep. 579; 2 Cow. Rep. 664. See charter, passed in 1836.]

2. The plaintiff should have been permitted to prove, that the notes taken by the commissioners answered the purposes of the company as cash. *Further*, that a certificate of stock was received by the defendant; this would have been proof of its existence, not the contents of the paper. [3 Phil. Ev. C. & H's notes, 1187; 7 Wend. Rep. 34.] The reason given by the defendant's attorney, for refusing to answer as to this point were insufficient to excuse him. [3 Phil. Ev. C. & H's notes, 1186; 4 Wash. C. C. Rep. 719; 17 Johns. Rep. 335; 18 Id. 330.]

3. Even conceding that five per cent. should have been paid in cash, for stock subscribed for at the time of subscription, and still the defendant cannot take advantage of the reception of notes instead of money. 1. Because of his knowledge and adoption of all the irregularities complained of. [16 Serg't & R. Rep. 140; Angell & Ames on Corp. 295–8; see also notes, 48; 1 Caines Rep. 381; 5 Litt. Rep. 47; 6 Verm. Rep. 315; 3 Hawks' Rep. 520; 2 Greenl. Rep. 404; 1 Hall's Rep. 191–8; 5 N. Hamp. Rep. 367; 7 Pick. Rep. ; 7 Mass, Rep. 184; 7 Conn. Rep. 86; 3 Pick. Rep. 327; 11 Mass. Rep. 118.] 2. Because the company have, since its organization, as well as himself, ratified and approved his subscription, by his election to, and acceptance of a place in the directory, &c. [Ang. & A. on Corp. 48, 138, 195–8; 11 Mass. Rep. 138.] 3. Because the subscription for stock, organization of the company, &c., were all done under the direction of commissioners appointed by the State. [3 Hawks' Rep.

520; 4 Paige's Rep. 229; 1 Metc. & P. Dig. 593, sec. 232. 4. Because the five cent. has been paid, and the company *de facto* organized. [2. Phil. Ev. 288, 305; 16 Mass. Rep. 101, 301; 5 N. Hamp. Rep. 367; 12 Wheat. Rep. 70–6; 10 Wend. Rep. 267; 5 Litt. Rep. 45; 6 Verm. Rep. 315; 1 Hall's Rep. 191.]

4. The defendant could not absolve himself from all liability to pay his proportion of the debts of the company, contracted upon the faith of stock subscribed, but not paid for. Justice and good morals forbid it. [Ang. & A. on Corp. 295; 21 Wend. Rep. 273.]

5. The provisions of the charter in respect to the manner in which the stock was to be paid for are merely directory—and it is not for the defendant to object that a *cash* payment was not made in *specie*, at the time of subscribing. [2 Stewart's Rep. 147; 11 Johns. Rep. 101—see note; Angell & A. on Corp. 292; 13 Eng. C. L. Rep. 194; 1 Caine's Rep. 381.]

6. The defendant cannot set up as a defence, that the plaintiff is not a corporation; the cases in the New York Reports, and in 8 Serg't & R. Rep. which maintain the right of a corporation to show a non-performance of a condition precedent, are very unsatisfactory. But if it were allowable to make such a defence, it cannot avail in this case; because the plaintiff had been recognized as a corporation before this suit was brought. [Statutes of 1838 and 1841.]

Plaintiff's counsel also cited, 5. Mass. Rep. 230; 2 Johns. Ch. Rep. 389; 5 Id. 381–7; 9 Wend. Rep. 351, 379; 5 H. & Johns. Rep. 122.

R. Saffold, and J. B. Clark, for the defendant.—1. The demurrers to the three first counts of the declaration, were rightly sustained. It should have been specially alleged, how the plaintiff became a corporation, and not generally that the company was organized according to the provisions of the charter; this is a conclusion of law which the court should determine from the facts. [1 Chit. Ple. 521; 2 Marsh. R. 550.] *Further*, that five dollars was paid on each share, at the time of subscribing. [1 Chitty's Plead. 309, 315; 1 Caine's Cases in Error, 86, 94; 8 Serg't & R. Rep. 219; 9 Johns. Rep. 217; 11 Id. 98; 14 Id. 238.] Nor is it alleged with sufficient precision that the defendant promised to pay.

[1 Chitty's Plead. 298.] The fact of subscription is not equivalent to a special promise.

2. But admitting that the objections pointed out to the declaration, cannot be sustained, then it is insisted, that an action will not lie for the non-payment of stock; the only consequence is a forfeiture of the stock. The cases in New York and Pennsylvania, which maintain this to be a cumulative remedy, are founded on statutes essentially different from the charter before us. This court have decided in analogous cases, that there is no remedy by action. [5 S. & Por. Rep. 17; 3 Por. 182. See also, 1 Caine's Cases in Error, 94; 2 N. Hamp. Rep. 380; 7 T. Rep. 36; 2 Bibb's Rep. 577; 5 H. & Johns. Rep. 122.]

3. That all the facts necessary to constitute the plaintiff a corporation, should have been proved under the state of the pleadings. [18 Johns. Rep. 137; 8 Verm. Rep. 445.] Where an act of the Legislature prescribes the manner in which a number of individuals may become a corporation, the directions of the act must be complied with. [2 Cranch's Rep. 167; 4 Wheat. Rep. 691; Ang. & A. on Corp. 49, 62.] One of the conditions to become a corporation in the present case, was the payment of five per cent. at the time of subscribing for stock, on the amount thereof; this requirement being disregarded, there could be no regular organization. [1 Caine's Cases in Error, 86, 94 and 9; 11 and 14 Johns. Rep. *ut supra;* 14 Serg't & R. Rep. 434; Ang. & A. on Corp. 64, 276; 6 B. & C. Rep. 341;] and the plaintiff cannot maintain an action. [2 Stew't Rep. 175.]

4. The acts of the defendant do not estop him from insisting that the plaintiff has no corporate existence; for they cannot make the plaintiff a corporation, but as already said, a compliance with the conditions of the statute can alone invest it with the power to contract and sue. [10 Mass. Rep. 384; 14 Mass. Rep. 286.] The case cited for plaintiff, from 16 Mass. Rep. 94, was in relation to a contract with a corporation duly organized, and as we insist, not applicable. The statutes of 1838, and 1841, do not make the plaintiff a corporation, the latter was passed after the suit was brought.

5. The defendant's counsel having declared, that his knowledge of the certificate of stock was as counsel, the court properly refused to coerce a further answer. [1 Porter's Rep. 433.]

6. The first call made on the stockholders according to the

evidence set out in the bill of exceptions, was in 1839, after the defendant's withdrawal from the company. It is then fairly inferrable that the debts of the association were contracted after the defendant dissolved his connection with it. This being the case, there is no petence for saying that he could not withdraw to the prejudice of creditors.

7. If the demurrer to the three first counts was improperly sustained, the plaintiff has not been prejudiced, but has had the benefit of them under the common counts, and cannot therefore insist on the error in the judgment upon demurrer.

The defendant's counsel also cited, 13 Sérg't & R. Rep. 256; 8 Johns. Rep. 378; 14 Id. 416; 8 Wend. Rep. 267; 15 Id. 316; 8 Mass. Rep. 138; Ang. & A. on Corp. 303, 4, 9, 10, 11.

COLLIER, C. J.—1. The act of the 22d December, 1836, "to incorporate the Selma and Tennessee Rail Road Company," among other things provides, that there shall be established a company with a capital of twelve hundred thousand dollars, in shares of one hundred dollars each, for the purpose of constructing a rail road from, and to, the points mentioned in the first count of the plaintiff's declaration. That books of subscription to the stock of the company, shall be opened under the superintendence of certain persons, who are particularly named. That the subscription for stock, shall be paid as follows, viz: "five dollars on each share, at the time of subscribing, and the remainder at such time as the directors hereafter mentioned may appoint. *Provided*, that not more than ten per cent. shall be called in at any one time, and twenty days notice given in some public newspaper for the payment of each instalment." *Further*, "that the said commissioners, or a majority of them shall, after the sum of five hundred thousand dollars of said stock has been subscribed, give public notice in some newspaper for the election of nine directors, who shall be stockholders, at such time and place as a majority shall direct; and the stockholders, either in person; or by attorney, shall meet at the time and place designated, and proceed to the election of said directors, to serve for one year, and until their successors shall be elected, &c." And the subscribers to the capital stock, their successors and assigns are, by the act, created a body corporate, by the name and style of the Selma Tennessee Rail Road Company, and invested with power

to do all lawful acts incident and pertinent to a corporate body, and which may be necessary and proper for the convenient transaction of its own affairs, &c. It is also enacted, "that if any stockholder shall fail, or neglect to pay any instalment required to be paid, for the period of ninety days next after the same shall be due and payable, the stock on which it is demanded, shall be forfrited to the company, together with the instalments which may have been paid thereon, and a new subscription may be opened to mak up such deficiency as may be caused by the non-payment aforesaid: *Provided*, that nothing in this section shall be so construed as to prevent the President and Directors of said rail road company from offering for sale the stock of any defaulting stockholder, or so much thereof as may be necessary to pay such defalcation, after giving twenty days notice of the time and place of said sale, in some newspaper, and out of the proceeds of said sale, after paying the amount of such defalcation, which may be due and unpaid, with all costs, the residue, if any, shall be paid over to the said defaulting stockholder."

We have recited this much of the charter, because it is material to an examination of the declaration. The questions arising upon the defendant's demurrer are, 1. Will an action lie upon a subscription for stock, such as that declared on? 2. Conceding that an action is maintainable in such case, are the three first counts sufficient in law?

1. There can be no question but an action of *Assumpsit* may be brought upon the defendant's subscription for stock, unless it is impliedly or expressly inhibited by the act under which the plaintiff claims a corporate existence. Such was held to be the law in Beene v. The C. & M. Rail Road Company, [3 Ala. Rep. N. S. 660.] In that case, the charter of the company provided, that "on failure of any stockholder to pay the amount due upon his, her or their stock, in pursuance of any call made by the President and Directors as aforesaid, within sixty days after such call, they shall be authorised to sell said stock: *Provided*, the same can be sold at not less than par value, for the amount so due." It was insisted that the corporation had no other remedy to coerce the stockholders to pay for their stock than to sell the same as the act prescribed; but this court considered that remedy to be merely cumulative, and not at all affecting the right to sue upon the direct promise to pay. So also in Instone v. The

Frankfort Bridge Company, [2 Bibb's Rep. 576.] The charter declared, that if an instalment required on any share should not be paid at the time prescribed, the right or interest of the holder thereof, should be sold at public auction, &c. It appeared that the shares on which instalments were sought to be recovered, had been offered, but not sold for want of bidders. The court said, that "the provision of the act giving to the company the right to sell the shares of a delinquent subscriber does not amount to a negative of their right to any other remedy, seems equally clear. The provision is in the affirmative, and it is a maxim of the common law, that an affirmative statute does not take away the common law." Again: "it is further argued, that as the company have elected to proceed under the act by exhibiting for sale the shares subscribed by the defendant, they are precluded from resorting to a suit at law. Had the shares been sold, their right to sue the defendant would without doubt, have been destroyed. But an unsuccessful attempt to sell, must surely be attended with a different effect. In that case, his right to the shares and to the immunities and emoluments attached to them remained; and therefore, according to the dictates of law, as well as of common sense, his obligation to pay could not be extinguished."

And where an action was brought by an incorporated company against a defendant on his subscriptions for stock, it appeared that the company were authorised by the act of incorporation to make calls upon the stockholders for the sums respectively subscribed by them, in such proportions, and at such times as the directors saw fit, *under penalties of forfeiture* of the shares subscribed, and of the previous payments made thereon; it was held, 1. That the company, might, in case of non-payment *proceed by suit* to recover the amount of the calls, or declare a forfeiture of the stock. 2. Even *after suit brought*, they might declare a forfeiture, and it could not be pleaded in bar of the *further maintenance of the suit*, where the value of the stock forfeited is not equal to the money due the company; and such plea, to be good, should contain an averment of equality of value. But if the stock forfeited, be less than the sum due, the defendant should be allowed its value in diminution of the recovery against him. The right of forfeiture was regarded as a cumulative remedy, and governed by the same rules, as if it it had been provided for by

the agreement of the parties. "It is the same as if the defendant, in addition to the promise of payment, agreed that on default, the directors of the company should have power to declare the forfeiture of the stock; in other words, that the company might resume their title to the stock sold. The effect of such a proceeding is perfectly well settled in every department of business. When the mortgagee of real or personal estate takes the thing pledged and sells it, or finally converts it to his own use, he is paid so much only towards his debt as the thing *sold for*, or *was worth* at the time of the conversion. [Globe Ins. Co. v. Lansing, 5 Cow. Rep. 380; Lansing v. Goelet, 9 Id. 346, 352, 353; Spencer v. Ex'rs of Harford, 4 Wend. Rep. 381; Case v. Boughton, 11 Id. 106.] And where the equity of redemption is released, or a strict foreclosure resorted to in any form, then so much is paid as the value of the thing mortgaged, at the time when the title becomes absolute in the mortgagee amounts to. [Spencer v. Ex'rs of Harford, 4 Wend. Rep. 381; Morgan v. Plumb, 9 Id. 287."] It was then concluded, that the forfeiture of the stock, which was but another name for foreclosure was not necessarily an extinguishment. [Herkimer M. & H. Co. v. Small 21 Wend. Rep. 273.]

But it is insisted that the case at bar is distinguishable from those cited, in the positive and peremptory terms which are employed in the act in respect to a forfeiture of stock; here the language is imperative, and declares, that upon neglect to pay any instalment demanded, the stock "shall be forfeited to the company, &c." and that the *proviso* does not impose upon them the necessity of selling, but makes it discretionary with them. This argument cannot be maintained. A subscriber cannot speculate upon the chances of a rise in stocks, and if the enterprise promises to be unprofitable, elect at his pleasure, to avoid a direct promise to pay by failing to meet calls made under the authority of the charter. In legal effect, there is no difference between the provision considered in the case in 21 Wen., and the 17 section of the act before us; under "*penalty of forfeiture*," and "*shall be forfeited*," in the connection in which they are found, are equivalent expressions. All forfeitures consequent upon the non-performance of some act or duty are regarded as penalties, and if absolute at law, are usually relieved against in equity.

In the cases cited from 3 Ala. Rep. and 2 Bibb, though they

do not expressly declare a forfeiture of stock to be a consequence of the subscriber's delinquency, yet the acts of incorporation, which were there examined, authorised a sale of stock upon the failure to pay an instalment. Now as such a sale could only have been made so as to pass a title to the purchaser, upon the supposition that the legal tittle had revested in the company, the authority to sell, implies a forfeiture, and will be quite as potent in its consequences as if it was expressed. The provision, notwithstanding its terms, when literally interpreted, may favor such an idea, does not authorise the company to appropriate to itself any stock on which calls shall not have been met without accounting to the proprietor to the extent of its fair market value. Such an enactment in Herkimer M. & H. Co. v. Small, was aptly assimilated to a mortgage in its effects; that by the neglect to pay an instalment, there was a forfeiture at law, and a sale might be made of the stock as a means of enforcing payment; if it sold for more than was due, the stockholder should be entitled to the excess, if for less, the company might recover the deficiency. The terms of the 17th section, are substantially those usually employed in a mortgage, and are annexed to the contract by which one becomes a subscriber for stock, quite as directly as if a lien had been given by deed to the company; and in our judgment their legal interpretation and effect must be as a mortgage, and nothing more.

It is however, argued, that the case of the Trustees of the University v. Winston, [5 S. & P. R. 17,] is a direct authority to show that the forfeiture of stock was absolute under the charter, by the election of the subscriber not to pay an instalment, and was exclusive of every other remedy by the company. In order to test the justness of this argument, we will briefly examine the case cited. That was an action of debt upon several bonds, executed by the defendant, for the payment of money at different times, in consideration of the purchase of several tracts of land of the plaintiffs. The lands were a part of those granted to this State by the Federal Government, for the establishment of a "Seminary of learning." The act which incorporated the board of trustees, and invested them with the legal title to the lands, among other things provided, that if a purchaser of any tract of land from the trustees, should "fail to make punctual payment of the amount of any one of the instalments which may become due on said tract

of land, the land shall be *absolutely forfeited* to the said trustees with the money paid thereon;" and the trustees are authorised after the expiration of three months, to dispossess the person in possession, by a writ of unlawful detainer, &c. *Provided*, that the purchaser or his assignee may, within three months after the first instalment falls due, which is unpaid, execute a bond or bonds with sufficient personal security for the payment of each of the remaining instalments by the time they respectively become due; and in such case, the land shall remain in the possession of such purchaser or his assignee. The question was, whether the plaintiffs could maintain their action, and the court held, 1. That the act of the legislature incorporating the Trustees of the University, made them a public corporation, and was subject to modification by the authority which enacted it. 2. That the statutes which provided for the sale of the lands imposed an *absolute forfeiture* as the consequence of a failure to pay the purchase money with punctuality, and that no suit could be sustained upon a bond, unless it was commenced within three months after its maturity. The grounds upon which the conclusion on the second point rests, are these: the legal title to the University lands was vested in the State; for their sale and every thing connected with it, it was within the competency of the legislature to provide; this being the case, and the acts upon the subject being public laws, they were operative *proprio vigore* to annul the contract of purchase without any act done on the part of the trustees, where the conditions they prescribed were not complied with. The same principle is perhaps more clearly if not more happily expressed in the subsequent case of Gill v Taylor [3 Por. R. 185] "There" say the court, "is a distinction between forfeitures at common law and under statutes. The rule of the former requires the party entitled to the forfeiture, to do an act which the law directs, to derive any benefit from the forfeiture. But a statute prescribes that a forfeiture shall be the consequence of an act, which is prohibited by it, or of an omission to do what is required; any one who may incur a forfeiture will be deprived of all his interest in, and title to the estate upon which the forfeiture operates, at the time the forfeiture accrued, and is disabled by law, from retaining the title or other interest, until the party entitled to the forfeiture, shall assert his right to it. The common law allows a discretion, and gives a forfeiture to the party entitled to it if he choose to take it. But such a

statute gives no discretion; it determines the will of the party entitled to the forfeiture, and makes the act when it is done or omitted an absolute and complete forfeiture." [See also Kennedy and Moreland v. The heirs of McCartney, 4 Porter's Rep. 157; U. S. v. Grundy & Thornbugh, 3 Cranch's Rep. 350, *et post*; U. S. v. 1960 bags of Coffee, 8 Cranch's Rep. 404; Fontaine v. Phœnix Ins. Co. 11 Johns. Rep. 300; Kennedy v. Strong, 14 Johns. Rep. 131.]

Notwithstanding the generality of the terms in which the court expresses itself *arguendo*, in the cases cited, it is apprehended that no case can be found where a forfeiture declared by statute in favor of an *individual or private corporation*, which is but an artificial person, vests a right, or confers a title, unless the party entitled shall so elect. In all the cases cited to this point, it will be found that the legislature had signified in advance, the consequence of a future act or omission, so far as the *public* were concerned; and this was regarded as equivalent to a subsequent election: wherever it is left to the discretion of some *public agent* to treat the act or omission as a forfeiture; in order to give to it that effect, he must make known such an intention. True, there are cases in which it has been held, that a provision in an act chartering a private corporation, authorising the sale of stock for the default of a subscriber in paying the amount of his subscription, is an implied inhibition of the right to sue for calls made by the company. But these cases are not placed upon the ground, that the stock by the non-payment of calls revests in the company, *eo instanti;* they rest upon the familiar maxim, *expressio unius, exclusio est alterius*, viz: by giving one remedy, the legislature impliedly excluded every other.

Without considering at greater length the effect of the 17th section of the charter, we will close the view which we have thought proper to take of this branch of the cause, by adding to the citations already made, several others upon the right of a corporation to maintain an action on a subscription for its stock.—[F. G. Company v. Alexander, 2 N. Hamp Rep. 380; Goshen Turnpike Co. v. Hartin, 9 Johns. Rep. 217; Dutchess Cotton M. Co. v. Davis, 14 Johns. Rep. 238; Taunton & So. Boston Turnpike v. Whiting, 10 Mass. Rep. 327; Middlesex Turnpike Corporation v. Swan, Id. 384; Franklin Glass Co. v. White, 14 Mass. Rep. 286; Chester Glass Co. v. Dewey, 16 Mass. Rep.

94; New Bedford & B. T. Corporation v. Adams, 8 Mass. R. 138; Salem M. D. Corporation v. Ropes, 6 Pick. Rep. 23; Central T. Corporation v. Valentine, 10 Pick. Rep. 147; Essex B. Co. v. Tuttle, 2 Verm. Rep. 393; Grays v. Turnpike Co. 4 Rand. Rep. 578; Tar River N. Co. v. Neal, 3 Hawks' Rep. 520; Worcester T. Co. v. Willard, 5 Mass. Rep. 80; The Bear Camp River Co. v. Woodman, 2 Greenl. Rep. 404; Phillips L. Academy v. Davis, 11 Mass. Rep. 113.]

It is further insisted, that the demurrer was properly sustained; because it does not appear from the declaration that the plaintiff had become a body corporate, authorised to sue, &c.: neither does the defendant's subscription for stock constitute a valid contract, nor is an express promise to pay alleged. In each of the three first counts, it is stated in general terms that the plaintiff is a corporation, in virtue of an act of the Legislature, and an organization thereunder, as required. But this mode of declaring is objected to, and it is said that the manner of organization should be specially alleged, that the court itself may determine whether the law has been complied with.

In the President, &c. of the U. S. Bank v. Haskins, [1 Johns. Cases, 132,] on a demurrer to the plaintiff's declaration, it was contended that the act incorporating the Bank was a private act, and should have been set out *in extenso*. But the court were of opinion, whether the plaintiff was a public or private corporation, it was not necessary to set forth the charter, or the names of the individuals composing the company. And in Grays v. Turnpike Co. [4 Rand. Rep. 578,] it was said, that although it is part of the case of a corporation which sues, to make out, under a proper issue, its corporate existence, yet "they need not indeed set forth in their declaration, by way of averment, how they were a corporation." To the same effect are Angell & Ames on Corp. 377; Bank of Utica v. Smalley, [2 Cow. Rep. 778.] The case of Harrison v. Wilson, [2 A. K. Marsh. R. 550,] determines no question adverse to the sufficiency of the declaration. It decides, that a plea should not aver matter of law and fact; but it should set out all the facts from which the law is deducible, leaving the law thereon to the court.

It is laid down in many cases, some of which are included in the citations already made, that the interest acquired by subscribing for shares in the stock of an existing incorporated company,

is a good consideration to support an action against a subscriber. It might well be inferred from what we have already seen, that where a person who becomes a stockholder of an incorporated company by signing an agreement with other subscribers, by which they promise to pay a specific sum for every share set opposite their names, he is liable in an action at the suit of the company. In Instone v. The F. B. Co. [2 Bibb, 576,] it was held, that in an action by a corporation against a subscriber of stock, no other consideration need be shewn than the subscription according to the terms of the charter; that imposing a legal liability, the law implies a promise to pay. Chitty says, "It has been considered, that where the contract is founded upon a legal liability, and implies a promise, it is sufficient to state such liability, without alleging formally that the defendant promised, as in assumpsit on a bill of exchange; and an agreement between two parties, but omitting the mutual promises, was held sufficient, because the agreement imported a promise." [1 vol. on Plead. 298.] If the authorities cited, as to the allegations of the counts demurred to, are to be recognized as laying down the law correctly, and to us they seem well sustained by principle, the conclusion is perfectly clear that the objections taken by the defendant are not well founded; and that the demurrer should have been overruled.

2. We come now to consider the questions arising upon the bill of exceptions. It is said, that presumptions are applicable as well to corporations as individuals: that persons acting publicly as officers of the corporation are presumed rightfully in office, and all necessary steps presumed, in order to make a corporate act legally operative. So, a charter, from the long exercise of corporate rights, or the acceptance of a new charter from the acts of the corporate officers, as well as many other things, may be presumed from circumstances. [Bank of the United States v. Dandridge, 12 Wheat. Rep. 70, *et post*; The State v. Carr, 5 New Hamp. Rep. 367; in Hagerstown T. R. Comp. v. Creager, 5 Har. & J. R. 125. See also, 1 Pick. Rep. 279; Id. 372; 17 Mass. Rep. 1 and 479.] the court say, "Where a corporation has gone into operation, and rights have been acquired under it, every presumption should be made in favor of the legality of its existence." [See also, Trott v. Warren, 2 Farf. Rep. 227.] So, in All Saint's Church v. Lovett, [1 Hall's Rep. 191,] it was held, that where there had been a corporate body *de facto*,

for a considerable time claiming to be a corporation and holding and enjoying property as such, it will be presumed that all merely formal requisites to the due creation of a corporation, have been complied with. [See also, U. S. v. Amedy, 11 Wheat. R. 392.]

Although it has been repeatedly held, that a person sued by an association, claiming to be a corporation, may throw upon the plaintiff the burthen of proving their corporate existence, yet it has been decided whenever the point has been made, that a charter cannot be adjudged void in an indirect proceeding. Thus, where an act of the legislature provided, that when six hundred shares had been subscribed, the commissioners should certify that fact to the Governor, who should incorporate the subscribers, &c. The certificate was made, and the charter granted; whereupon, the government subscribed twenty thousand dollars; when, in truth, three hundred shares of the number required, were fictitious stock, subscribed for the purpose of deceiving the Governor, and thus procuring the charter. On these facts, it was said, "If this charter was deceptively obtained—obtained by false representations, it could not, in a collateral action, in an action brought by the company to compel the performance of contracts entered into with it, be declared void. But if this charter had been fraudulently obtained, on which I am not called upon to give any opinion, still until that question had been directly decided, in a proceeding instituted in this court, which alone has jurisdiction, either by *scire facias*, to repeal the charter, or declare it forfeited, or by a writ of *quo warranto* at the suit of the State, in which the State must be a party, and a party to the judgment for the seizure of the franchise, there is no instance of calling in question the right of a corporation, for the purpose of declaring its charter void, but at the instance, and on behalf of the government, and never on the relation of any individual." [The President, &c. of the K. & C. Turnpike Road Co. v. McConaby, 16 Serg. & R. R. 145.] After laying down the law in terms quite as explicit, in the State v. Carr, [5 N. Hamp. R. 371,] the court say, "in cases of this kind, it is enough to show that there was a charter under which the corporation was acting; and that it was wholly immaterial whether the corporation had complied with the requisitions of the charter or not. That is a matter to be settled in a suit between the government, which created the corpora-

tion, and the corporators, and not collaterally, in a prosecution by another State against a stranger to the corporation."

In the Tar River Nav. Co. v. Neal, [3 Hawks' R. 520] it was decided, that where, by a charter, commissioners are directed to ascertain the performance of a condition precedent to incorporation, and they declare it, though falsely, to have been performed, it shall be deemed true, until the sovereign power interposes. A wrong doer, sued by the corporation, cannot show the falsity of such declaration. [Grays v. Turnpike Co. 4 Rand. Rep. 578; Bear Camp River Co. v. Woodman, 2 Greenl. Rep. 404; Charles River Bridge v. Warren Bridge, 7 Pick. Rep. 371; Vernon Society v. Hills, 6 Cow. Rep. 23; Lehigh Bridge Co. v. Lehigh Coal, &c. Co. 4 Rawle's Rep. 9; Chester Glass Co. v. Dewey, 16 Mass. Rep. 101; see also, 2 Blackf. Rep. 367; 8 Greenl. R. 372.] The decision of this court, in Carlisle v. Cahawba and Marion R. R. Co. at the June term, 1842, is not opposed to the law as stated in the cases cited. That was an action brought for the recovery of calls made upon a subscription for stock. The charter did not, *per se*, consummate the corporate powers of the company, but authorised the President, &c. to require instalments to be paid upon the stock, when they should have organized agreeably thereto. It was held, that to entitle the plaintiff to maintain their action, it should be shown that the organization had taken place as required; but the court do not say that this may not be inferred from circumstances where there are such as to warrant the inference; nor that an organization *de facto* is insufficient to authorize a recovery. The charter expressly required, that after the stock was apportioned according to subscriptions, then the stockholders should meet at a time and place designated, and elect directors, &c. This was a condition precedent to the right to require payments to be made for stock, and was just as much a part of the subscriber's contract, as if it had been recited therein in *totidem verbis*: and unless it had been performed by those whose duty it was to act, or in some manner waived by the subscribers, it would follow upon principles of reason and justice, that the company could not maintain an action. In the present case it is not denied, that an organization of the company, as provided by the charter, is necessary to the plaintiff's right to sue, but it is insisted that if this has been done, though irregularly, and especially with the approbation of the defendant, as manifested by his

acts, he is bound to pay for his stock. To the consideration of this argument we will now address ourselves.

We will not inquire whether the payment of five dollars upon each share of stock, at the time of subscription, was indispensable to entitle the subscriber to become a corporator, or whether the money may be substituted by a note or bill. That there are cases which go the length of affirming the necessity of making such payment, and in cash, has not been controverted. [See Highland T. Co. v. McKean, 11 Johns. Rep. 100; Goshen T. Co. v. Hurtin, 9 Id. 218; Hibernia T. Co. v. Henderson, 8 Ser. & R. Rep. 219; Ogle v. Somerset, &c. Co. 13 Id. 256; Grayble v. York, &c. Co. 10 Id. 269; Leight v. Susquehanna, &c. Co. 14 Id. See also Union T. Co. v. Jenkins, 1 Caine's Rep. 391, dissenting opinion of Lewis, Ch. J. and 1 Caine's Cases in Error, 86, which was sustained.] The view which we take of the case before us will relieve us from the necessity of considering what may be the law on this point. The facts embodied in the bill of exceptions we think, place the defendant in a situation which deny to him the right of insisting that his subscription was not made in the manner prescribed by the charter. His participation in the organization of the company, his assent to treat it as a corporation as indicated thereby, and still more strongly by the payment of his note given for the five per cent., and the acceptance of a place in the directory, all seem to show that he regarded the plaintiff as a corporation, liable to all burthens and entitled to all privileges which the charter provided. Under such circumstances, both law and reason concur in saying that the defendant shall not be permitted to object that his subscription for stock does not oblige him to pay the amount, because he had not paid a part of it, at the time he should, or because the plaintiff should not have organized and assumed the exercise of corporate functions. In Hampshire v. Franks, [16 Mass. Rep. 87,] it is said, "No man can be compelled by the legislature to become a member of a corporation without his consent; yet if he do consent, and even not expressly, but by implication, he cannot afterwards deny his liability to the lawful exactions of the corporation, on the ground, that he did not solicit the privilege, and was no party to it when granted." [See 2 Mass. Rep. 269; 2 Rawles' Rep. 359.] And in Commonwealth v. Worcester T. Corporation, [3 Pick. Rep. 327,] the question was, whether the road was part of the turn-

pike of the corporation. It appearing that they had received toll from persons travelling thereon, the court said, "It is not for them to object that the road as made has never been accepted, for that would be to aver their own wrong or negligence in excuse for the omission of a duty. The fact of receiving toll, is as to them, conclusive evidence of their liability for repairs."

Not only estoppels, technically so called, but estoppels *in pais*, operate both for and against corporations; and it may be laid down generally, that a party will be concluded from denying his own acts or admissions, which were expressly designed to influ-influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter.—[Welland Canal Company v. Hathaway, 8 Wend. Rep. 483.; Chester Glass Co. v. Dewey, 16 Mass. Rep. 101. See also, Lucas v. The Bank of Georgia, 2 Stew't Rep. 147.] Under the influence of this rule, it has been held, that a person entering into a contract with a company under their corporate name, can not object that they had not been regularly constituted a corporation. [Dutchess C. M. v. Davis, 14 Johns. Rep.] And where an act of the legislature gives to individuals a corporate capacity, upon the performance of certain acts, a person contracting with these individuals, by their corporate name, will not be permitted to deny the performance of those acts necessary to constitute them a corporation. [Hamtramck v. Bank of Edwardsville, 2 Missouri Rep. 169.] But the case of the President, &c of the K. & C. Turnpike Road Co. v. McConaby, [16 Serg. & R. R. 140,] cited to another point, is more strikingly applicable upon the question of estoppel. There, the court decided, where a charter has been obtained by means of fictitious subscriptions for part of the stock, and a fraud has been committed on a real subscriber, by which he has sustained or might sustain injury, no action can be maintained against him by the corporation, for the amount of his subscription; but where such subscriber has accepted the charter, and by his own acts put it in operation, he cannot avail himself as a defence, of the fact, that part of the stock was fictitious.

Having attained the conclusion, that the facts stated in the record, estop the defendant from insisting that five per cent. was not paid upon the stock for which he subscribed, at the time of subscription, we have to inquire whether it was competent for

him, by an announcement of his withdrawal from the company, to absolve himself from liability to pay any further instalment which might be demanded of him. It will result from what has been already said, that such a privilege is not accorded to a subscriber. This conclusion necessarily follows, if, as we have seen, he is liable to the action of the corporation, and cannot force them to resort to the remedy afforded by the charter, of claiming a forfeiture of stock. Besides, the subscription for stock, as it entitles the subscriber to all the benefits and immunities of a corporator is a valid contract, and of consequence obligatory upon him until it has been rescinded according to law. In the case of Kidwelly Canal Co. v. Raby, [2 Price's Rep. 93,] it was held, that one of several persons who have subscribed an agreement *inter se*, to promote a joint undertaking, or common purpose, cannot withdraw his name and discharge himself from the engagement, without the consent of the rest of the subscribers. And if an act of Parliament have been passed for effectuating the purpose of the undertaking, by which certain obligations are created, such original subscriber is not exonerated from the liabilities imposed by the *act*, by having, during the progress of the bill, renounced before the committee, all further connection with the undertaking, and desired that his name might in consequence be omitted in the *act;* nor can the circumstance of his name being omitted have the effect of disengaging him. [See also Martyn v. Hynd, Doug. Rep. 142; Religious So. v. Stone, 7 Johns. Rep. 112; Pres't &c. of the B. and South Amboy T. Co. v. Imlay, 1 South. Rep. 285.] And in Marcy v Clark, [17 Mass. Rep. 330,] it was decided that the stockholders being made liable by an act of the legislature to the payment of the debts of the corporation, one of them could not by a fraudulent transfer of his shares avoid such liability. [See also United Society v. Eagle Bank, 7 Conn. Rep. 456.]

We have already drawn this opinion greatly beyond what we had expected; and will decline the consideration of the remaining questions raised by the bill of exceptions, inasmuch as they are embraced by those considered, or will not probably arise in the ulterior progress of the cause. Without undertaking a special application of the points examined, to the bill of exceptions, or to recapitulate to any extent, (as the errors pointed out have been

made sufficiently apparent,) we will only add, that the judgment of the circuit court is reversed, and the cause remanded.

McDOUGALD v. REID & TALBOT.

1. A decree in bankruptcy, obtained according to the statute, operates at once as a discharge of all the debts of the bankrupt, whether reduced to judgment or not.
2. A levy made, on an execution against the bankrupt, which issued previous to his obtaining his discharge, but after the filing of his petition, will be quashed by the court out of which it issued, on motion.

ERROR to the Circuit Court of Macon.

This was a motion in the court below, by the defendants in error, to quash an execution, and levy thereon, which had issued on a judgment of the plaintiff against them, subsequent to the time of their making application to the United States Court for the Southern District of Alabama, and upon which they had obtained a decree in bankruptcy. Upon the trial of the motion, the defendants produced the record of the proceedings in bankruptcy, showing the petition, schedule, decree in favor of the petitioner, and confirmation thereof by the Hon. Wm. Crawford, certified by the clerk under the seal of the court; whereupon, the court overruled the objection made to the admission of the transcript, and quashed the execution and the levy thereon, from which this writ is prosecuted.

The error assigned is, the court erred in quashing the execution.

GOLDTHWAITE, for the plaintiff in error.
BILLINGSLEA, *contra.*

ORMOND, J.—This cause was submitted without argument. It is stated in the bill of exceptions, that the plaintiff objected to the transcript, and certificate of the record in bankruptcy, but no

particular cause was assigned for its rejection, nor has any been stated here. On looking into it, it appears to be regular. The petition was filed prior to the issual of the execution, and, as is stated in the judgment, *prior* to the judgment. The plaintiff is recited in the petition as one of the creditors of the petitioner.—Some of the creditors appeared and contested the right of the petitioner to be declared a bankrupt; and that upon the hearing, he was by the court declared a bankrupt, and the decree, under the seal of the court, ordered to be certified and delivered to the bankrupt, on the 5th April, 1842. This decree was confirmed at a subsequent term of the court, held on the 4th Monday of December, 1842, when it is recited that the petitioner had complied with all the requisitions of the act of Congress, and that no written dissent had been filed to the decree previously made by a majority in value and number of the creditors who have proved their debts, and no cause being shown to the court why the prayer of the petitioner should not be granted, "it was ordered by the court, that Hiram Reid be and accordingly hereby is fully discharged of and from all his debts owing by him at the time of the presentation of his petition, to be declared a bankrupt, &c."

Similar proceedings were also had in the case of the other defendant.

Nor can any doubt exist that the proceedings of the United States Court, under the seal of the court, and certified by its clerk, must be received as true, without further proof. The only question, then, which remains, and the only one which it is probable was intended to be raised in this court, is, what is the effect of a decree in bankruptcy upon a debt in suit, or upon a judgment obtained against the debtor, pending his application for a discharge from his debts under the bankrupt law?

The 4th section of the bankrupt law declares, "That every bankrupt who shall *bona fide* surrender all his property, and rights of property, with the exception before mentioned, for the benefit of his creditors, and shall fully comply with and obey all the orders and directions which may, from time to time, be passed by the proper court, and shall otherwise conform to all the requisitions of this act, shall (unless a majority in number and value of his creditors who have proved their debts, shall file their written dissent thereto) be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declar-

ed him a bankrupt, and a certificate thereof granted by such court accordingly, upon his petition filed for such purpose; such discharge and certificate not however to be granted until after ninety days from the decree of bankruptcy, &c.; and such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements which are provable under this act, and shall and may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever, and the same shall be conclusive evidence of itself, in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property as aforesaid, contrary to the provisions of this act, or prior reasonable notice, specifying such fraud or concealment," &c.

During the present term we have held that the filing of a petition for the benefit of the act, did not arrest the progress of a suit for a debt due by the petitioner; because, until the decree in bankruptcy, it could not be known whether he would be discharged from the debt; but the decree when made in conformity with the statute, by operation of law, at once discharges the bankrupt from his debts, whether reduced to judgment or not. The judgment being discharged, the *lien* of the execution was gone, and could no longer sustain the levy made whilst it was in force. The court, therefore, did not err in quashing the levy. It appears, also, that the court quashed the execution; but this was a mere act of supererogation, and could not prejudice any one.

Let the judgment be affirmed.

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12. An accommodation drawer is a surety, and entitled to notice, although he had no funds in the hands of the drawee.—*Sherrod* v. *Rhodes*.....683

13. In such a case the fact that the drawer was indebted to the acceptor, for whose use the bill was drawn, in a sum equal to the amount of the bill, will not dispense with notice of the dishonor of the bill, unless the bill was drawn in payment of the debt.—*Ib*..... 683

14. A bill being drawn by R, for the accommodation of an incorporated company, to enable it to raise money by its sale, and the bill not being paid at maturity, the treasurer of the company informed R of that fact, and that the holder threatened suit, but would take a good bill for the amount which he urged R to draw, as he was indebted to the company in about that sum. R, in his answer, after stating his resources, says, "It would afford me great pleasure to do as you wish, but I think from the above expose you will agree with me it would be improper to do it"—held, that this was not a waiver of notice of the dishonor of the bill.—*Ib*.....684

15. If the last endorser of a bill be notified of its dishonor, if he wishes to hold any prior party on the bill liable to him, he must give him notice, unless due notice had previously been given to such party by the holder.—*Ib*..... 684

BILL OF LADING.

1. A bill of lading is a writing of a two-fold character—1, a receipt—2, a contract, to carry and deliver goods; as a receipt, it may be contradicted by parol evidence, but in other respects it is treated as other contracts. But where the shipper is impliedly bound from the face of the bill to pay the freight of goods,

it is allowable to show that the owner of the boat received them under an agreement with a third person to pay the freight, if the latter has paid it —*Wayland*'s *adm*'r v. *Mosely*..... 430

BOND.

1. It is no defence to a bond, that it was signed by some of the obligors "under the expectation, with the full understanding, and under assurances from the public officer, authorised to take it, that another person should also execute it as a surety," when it is not shewn that this was made the condition of its delivery. If they understand the bond is to be executed by an agent, it rests with them to examine his authority; and they are not discharged if it is invalid as to other persons, from a defect in the agent's authority.—*McClure, et al.* v. *Colclough, et al.*..... 66
2. An averment that a sheriff's bond was never received or approved, by the officer appointed for that purpose, is a sufficient allegation to put the obligee upon proof of its acceptance; but it is not necessary that this should appear either by record or by written evidence. It is sufficient to raise a violent, if not a conclusive presumption, that the bond was received by the court, when it is found upon the files without any evidence accompanying it that it has been rejected, and the principal has executed the duties of his office.—*Ib*..... 66
3. When a judgment is rendered against sureties in a summary manner, as was formerly the case in this State, upon forthcoming bonds; or as was here irregularly rendered against the sureties on the administration bond, such a judgment is distinct and separate from, and cannot be connected with the previous judgment, by suing out a writ of error. When a writ of error is sued out in the names of the sureties, it only removes the judgment rendered against them.—*Clarke* v. *West, et al*..... 117
4. The sureties upon the general administration bond, are liable for the proceeds of lands sold by the administrator, although before he is allowed to receive such proceeds, he is required, by statute, to execute a special bond, conditioned for the faithful payment and application of the money. The last bond is considered merely as an additional security.—*Ib*..... 117

CHOSE IN ACTION.

1. A mere right of action in a chattel, cannot be sold so as to vest in the purchaser the right to sue for its recovery: but as the right to personal property draws to it the possession, if the possession of another is derived from, and held in subordination to that of the owner, as in the case of a bailment, he may sell, and his vendee will have the right to sue for its recovery, if the possession is improperly withheld.—*Foster* v. *Goree*..... 424

CHANCERY.

1. When a judgment at law is obtained against one, who notwithstanding, has an equitable defence, and he sues out a writ of error to reverse the judgment at law, he is not thereby precluded, after its affirmance, from seeking relief in equity.—*McClure, et al.* v. *Colclough, et al.*..... 65

2. When the attorney of the plaintiff, or an agent, sufficiently authorised, induces a sheriff to omit returning an execution, three days before the proper term, by advising him that it will be sufficient if returned on the first day of the court; this will constitute a defence to a rule against the sheriff and his sureties for the neglect to return the execution on the first day of the court.—*Ib.* 65

3. When sureties in such a case, seek relief in equity, the allegations of the bill must be equally distinct and positive, as are necessary to constitute a good plea of *non est factum*, at law.—*Ib.* 66

4. Contracts made between trustee and *cestui que trust*, or between guardian and ward, soon after the latter comes of age, or one standing in the relation of guardian, are viewed with so much jealousy by courts of chancery, that they are voidable by the latter, if within a reasonable time, he seeks to avoid the contract. Such a contract can be supported only where the trustee or guardian, previous to the contract, has made such a full and fair disclosure of all the facts or circumstances which have come to his knowledge as such, as to enable the other party to deal with him on equal terms—whether mere inadequacy would not be sufficient to set aside such a contract—*Quere. Johnson* v. *Johnson.* 90

5. The statute of limitations is as available in equity, as at law, in all cases where the courts have concurrent jurisdiction; but the mere staleness of a demand will prevent a court of equity from granting relief when no statute of limitations governs the case.—*Ib.* 90

6. A purchase by an administrator of one of the distributees, shortly after he came of age, of all his interest in his father's estate, the administrator having rendered no inventory of the estate, or stated an account, and the purchase being made at a grossly inadequate price, considered fraudulent and voidable at the election of the distributee, if application had been made for that purpose within a reasonable time afterwards, or within a reasonable time after obtaining knowledge of the fraud.—*Ib.* 90

7. After the lapse of eleven years from the making of such a contract, a court of equity will not lend its aid to rescind it, and compel the administrator to account; the distributee having, when the contract was made, or soon afterwards, knowledge of circumstances sufficient to put him on enquiry, and six years afterwards being affected with the notice of the fraud.—*Ib.* 91

8. Notwithstanding a fraud may have been committed, the bar, from lapse of time, will be effectual, unless a suit is prosecuted within a reasonable time after the discovery of the fraud; and it is not true, at least in equity, that time does not commence running until after the discovery of the fraud.—*Ib.* 91

9. When lapse of time is relied on by the defendant, if the complainant wishes to avail himself of any of the exceptions to the rule, he must put such matter in issue, either by amending his bill, or by a special replication.—*Ib.* 91

10. An allegation in a bill, that the complainant was not advised, until long after the settlement was made, that a fraud had been practiced on him, is too vague and uncertain. The time when he acquired such knowledge should have been stated.—*Ib.* 91

11. A judgment of the county court, refusing to appoint an individual guardian of the estate of certain minors, is not a bar to a suit in chancery, by the minors to recover their legacies.—*Stallsworth, et al.* v. *Stallsworth, ex'or* 146

12. Where the allegation of the bill was that a deed was not made upon the consideration expressed in it, or the consideration *bona fide* paid, or secured to be paid, held, that the answer stating that the consideration of the deed was the

note of a third person, six months past due, which was transferred by delivery to the grantor, and was then by them *considered good*, was not responsive to the allegation, the deed expressing a monied consideration.---*Cummings & Cooper* v. *McCullough, adm'x*..... 325

13. It is not indispensable for a party, against whom a recovery at law has been obtained, on a contract founded on a gaming consideration, to show any reason why he did not make a defence in that forum, to entitle him to come into chancery, and obtain relief.---*Cheatham* v. *Young*..... 353

See *Divorce and Alimony*, 1, 2.

See *Will, and Probate of*, 1, 2.

See *Trust and Trustee*, 10, 11, 12.

See *Garnishee*, 6.

See *Gaming*, 1.

See *Vendor and Vendee*, 16. 21.

See *Mortgagor and Mortgagee*, 5.

CLERK OF COURT.

1. The clerk of a court is authorised by statute to receive of a defendant against whom a judgment is rendered by his court, the amount of the same; and this as well before as after an execution has issued.---*Murray* v. *Charles*..... 678

CRIMINAL CASES, AND PROCEEDINGS IN.

1. Where a recognizance taken before a justice of the peace, has been signed and sealed by the principal and his surety, its validity is not affected by the failure to insert the name of the latter in a blank left for that purpose, in the body of it. *Badger and Clayton* v. *The State*..... 21

2. A statement made by a justice of the peace, preceding a recognizance, which shows the manner of its execution, and who are the recognizors, is equivalent to a formal certification of those facts made at the foot of it.---*Ib*..... 21

3. A judgment *nisi*, on a recognizance reciting the charge to be the *exhibition of a circus without first obtaining a license according to law*, cannot be supported; the statute making it indictable to *exhibit a circus for hire, pay, or emolument, without a license*.—*Ib*..... 21

4. A judgment may be rendered for the penalty of a recognizance, though this exceeds the amount of the forfeiture which the law imposes, upon a conviction of the offence with which the principal recognizor is charged.---*Ib*..... 22

5. The 25th section of the 8th chapter of the act "Regulating punishments under the Penitentiary system," makes the return of "Not found" to an *original* and *alias scire facias*, equivalent to personal service.---*Ib*..... 22

6. Although the 22d section of the 8th chapter of the penal code, requires the court to sentence a convict who fails to pay the fine and costs, to the county jail for a definite time; yet, if the court fails to render such judgment, and in lieu thereof, directs that he "remain in custody until the fine and costs are paid," he cannot object on error, to the regularity of the judgment, as it is more beneficial to him than the law requires, and he may obtain a discharge from imprisonment upon taking the oath provided for insolvent debtors.---*Ooton* v. *The State*..... 463

7. An indictment for murder, framed as at common law, and concluding against

the form of the statute, will warrant the conviction under the fifth section of the third chapter of the "Penal Code," of a person, who shall, with malice aforethought, cause the death of a slave, by cruel, barbarous, or inhuman whipping, &c.; or under the sixth section, of an *overseer or manager* who shall cause the death of a slave by barbarous or inhuman whipping, or beating, &c. --*The State* v. *Flanigin* 477

8. Where a charge given to the jury in a criminal case, is not expressed in terms strictly appropriate; yet if it is not opposed to law, and can not be supposed to have misled them, it will not be considered an error for which the judgment consequent upon a verdict of guilty should be reversed.---*Ib*..... 477

9. The jury were informed that if they found the accused guilty of one grade of an offence, the punishment which the law required the court to inflict, was imprisonment in the penitentiary for a period not less than two, nor more than ten years: *Held*, that although ten years was the shortest period for which the court was authorised to imprison in such cases, yet the error was not fatal to the judgment, as it could not have influenced the jury in the performance of their duties....*Ib*..... 478

10. The 6th and 7th sections of the 3d chapter of the penal code, do not create an offence unknown to the common law, or increase the punishment of a common law offence; the offences therefore, described in those sections may be proceeded against, and punished upon an indictment for murder at common law....*The State* v. *Jones*..... 666

11. When there is one good count in an indictment, the verdict and judgment will not be disturbed....*Ib*..... 666

12. The court may refuse to quash a count in an indictment, and such refusal can not be assigned as error....*Ib*..... 666

13. The court may in its discretion permit the prosecutor to elect on which of the counts he will proceed....*Ib*..... 666

14. When a bill of exceptions is allowed in a criminal case, the facts embodied in it become a part of the record; and if a writ of error is allowed, it brings up the entire record, and error may be assigned on any part of it....*Ib*..... 666

15. As the jury may find a general verdict, they are judges both of law and fact, and may, if they think proper to do so, disregard the opinion of the court upon the law...*Ib*..... 666

16. The proper form of the oath to be administered to the jury, in a criminal case, is, that they shall "render a true verdict according to the evidence." 666

17. Where a judgment by *default* has been rendered against bail in a criminal case, a revising court will not look to a recognizance found in the transcript, as a part of the record....*Robinson and another* v. *The State*..... 706

18. Although a *scire facias* issued upon a judgment *nisi*, rendered on a recognizance, be served upon all the recognizors, the State may take judgment against some of them, and allow the proceeding to be silently discontinued as to the others...*Ib*..... 706

19. The 25th section of the 8th chapter of the penal code, makes the return of "not found" to an *original* and *alias scire facias* equivalent to the personal service of process....*Ib*..... 706

20. Where no evidence is adduced to show that the defendant is guilty of the forgery of a note, as charged, it is not allowable for the jury to compare the note with a paper admitted to be written by the defendant, and if satisfied of the sameneness of the hand-writing, to convict him of the offence....*The State* v. *Givens*.....748

21. A paper affirming that certain persons are solvent, and able to pay a note to which their names appear as makers, is a written expression of opinion, and not such a writing as may be the subject of a forgery, under act of 1836, defining the punishment of that offence....*Ib*.....748

22. If the intention to defraud is manifest, forgery may be committed by using a *fictitious* as well as a *real* name....*Ib*.....748

23. There can be no conviction upon a count charging an intent to defraud a person or corporation which has no existence; for non-entities have no rights to be prejudiced by such an act....*Ib*.....748

24. Where the charge is the false making of a note, &c., but the count also sets out a written recommendation of the solvency of its makers, without any allegation in respect thereto, the defendant may be found guilty by proof of the forgery of the note, although no evidence is adduced as to the recommendation....*Ib*. 748

25. Where the accused is guilty on some one or more, but not all the counts in the indictment, the jury should thus limit their verdict, according to the facts of the case; and the court should so instruct the jury when called on by the defendant....*Ib*.....748

See *Costs of Suit*, 2.

See *Insanity*, 3, 4, 5.

CONSIDERATION.

1. When the want or failure of consideration of a note, is shewn by the defendant in an action, by the endorsee of a note negotiable and payable in bank, it rests with the plaintiff to show that he gave value for it before its maturity, in order to obviate the decree.—*Marston* v. *Forward*.....347

CONSTRUCTION.

1. A deed conveying slaves in trust for the uses of the legal heirs of Margaret W, upon her body to be begotten; and in the case of the failure of issue of the said M W, to revert, &c. The proceeds arising therefrom to be applied to the support of M W during her natural life, in case she shall have no children living, and at her death to revert, &c." vests no interest in M W so long as she has children living.—*Thomas* v. *Wallace*.....268

2. Under such a trust, the children of M W, or their descendants, are entitled to the use of the property, and the possession of the slaves by their father, is a possession by him as their natural guardian, and although it may have remained for more than three years without the assertion of title by the trustee, cannot be considered as a loan to the father, so as to bring the slaves within the influence of the statute of frauds, and make a purchase from him valid.—*Ib*.....268

3. Where slaves and other property were given to infants by deed, and one of the conditions of the gift was, that the donees were to keep the negroes and other property together, in the possession of their mother, for their use and benefit, un-

til the youngest came of age—*Held*, first, that the mother was thereby created a trustee, to appropriate the avails of the labor of the slaves to the maintenance of the infants, the father being insolvent: Second, that as the infants had no land to cultivate, it was proper in the mother to provide land for that purpose, and that the trust fund was not the crops made by the slaves, assisted by others which the mother procured, nor the price of the hire of such slaves, but the actual value of the labor of the slaves: Third, that to ascertain the trust fund, an account must be stated annually, charging her with the value of the labor of the slaves, and giving her credit for a reasonable sum, for her care, attention and labor in the supervision of the slaves, also for the board and clothing of the children, and for all monies expended in their education, and for medical attention during sickness. That if the balance of the account thus stated, was against her in any one year, she might carry it forward to succeeding years, when the balance might be in her favor, but could not lessen the principal of the trust fund, without first obtaining an order from the chancellor.—*Bethea* v. *McColl, et al.*..... 308

4. P & S gave a receipt, acknowledging that they had received from S & M, all their books of account, notes, &c.; and stock of goods, valued at twelve thousand dollars; also their right, title, &c., to certain real estate, valued at three thousand dollars, "for the payment of the following notes;" the amount and dates, and time when due, are particularly stated, the aggregate sum of which is nearly twelve thousand dollars: *Held*, that the writing did not indicate an absolute sale of the books of account, &c., but showed that they were received as a security for the payment of the notes of which P & S were previously in possession; that it was competent for S & M to show that P & S had realized a sum more than sufficient for that purpose, and to recover the excess.—*Sims & McQueen* v. *Pryor & Saxon*..... 592

5. A writing acknowledging the receipt of money of the plaintiff, and promising to account for the same on final settlement with him, is not such a writing within the statute, as authorizes a judgment final by default.—*Wellborn* v. *Shepard*..... 674

CONTINGENT REMAINDER.

1. A life estate being conveyed by deed in certain slaves to husband and wife, and upon the death of the survivor, remainder to the heirs of the wife—*Held*, that as there were no words securing a separate estate to the wife, the legal effect of the deed was to create a life estate in the husband, with a contingent remainder to the heirs of the wife; and that on the death of the wife before the destruction or termination of the particular estate, the remainder became vested in the heirs of the wife.—*Price, et al.* v. *Price*..... 578

CONTRACT.

1. Contracts made between trustee and *cestui que trust*, or between guardian and ward, soon after the latter comes of age, or one standing in the relation of guardian, are viewed with so much jealousy by courts of chancery, that they are voidable by the latter, if within a reasonable time, he seeks to avoid the contract. Such a contract can be supported only where the trustee or guardian,

previous to the contract, has made such a full and fair disclosure of all the facts or circumstances which have come to his knowledge as such, as to enable the other party to deal with him on equal terms—whether mere inadequacy would not be sufficient to set aside such a contract—*Quere.—Johnson* v. *Johnson.* 90

2. A confirmation of an invalid contract, to be operative as such, must be made with full knowledge of all the facts, the ignorance of which rendered the previous contract void, and with the intent that such act should confirm it.—*Ib.* 90

3. A purchase by a trustee from his *cestui que trust*, though open to enquiry within a reasonable time, puts an end to the trust.—*Ib.* 90

4. A purchase by an administrator of one of the distributees, shortly after he came of age, of all his interest in his father's estate, the administrator having rendered no inventory of the estate, or stated an account, and the purchase being made at a grossly inadequate price, considered fraudulent and voidable at the election of the distributee, if application had been made for that purpose within a reasonable time afterwards, or within a reasonable time after obtaining knowledge of the fraud.—*Ib.* 90

5. After the lapse of eleven years from the making of such a contract, a court of equity will not lend its aid to rescind it, and compel the administrator to account: the distributee having, when the contract was made, or soon afterwards, knowledge of circumstances sufficient to put him on enquiry, and six years afterwards being affected with the notice of the fraud.—*Ib.* 91

6. An agreement by the Branch Bank of the State of Alabama, to receive such bills as a rail road company could lawfully issue, and to pay the same out as circulation, will not avoid a recovery on bills of exchange, given for the loan by the Bank of such bills, as being contrary to the policy of the laws of the State, with reference to its banking institutions.—*The Branch Bank at Montgomery* v. *Crocheron, et al.* 251

7. A bill of lading is a writing of a two-fold character—1, a receipt—2, a contract, to carry and deliver goods; as a receipt, it may be contradicted by parol evidence, but in other respects it is treated as other contracts. But where the shipper is impliedly bound from the face of the bill to pay the freight of goods, it is allowable to show that the owner of the boat received them under an agreement with a third person to pay the freight, if the latter has paid it—*Wayland's adm'r* v. *Mosely* 430

8. A contract founded on an act prohibited by statute, is void; therefore a note executed upon the purchase of a horse by the vendee, on Sunday, cannot be enforced by the vendor, in a court of justice.—*O'Donnell, et als.* v. *Sweeney* 467

9. A parol contemporaneous agreement cannot be permitted to vary a contract in writing, or change its legal effect—*Holt* v. *Moore* 521

10. K, a debtor to the Bank, proposed in writing to the Bank, to discharge his debt in state stock, in a reasonable time; the Bank acted on the proposition, and modified it by making alterations in its terms, and offered to receive the stock on the terms thus proposed, within one hundred and twenty days. This proposition K, as a witness stated, *agreed* to, but did not notify his assent to the Bank: *Held*, that neither K, or the Bank were bound by the arrangement, and that therefore the sureties of K were not discharged.—*Branch Bank at Huntsville* v. *Robinson, sheriff* 623

11. An order made by the directors of the Bank, after the time within which the stock was to have been delivered, enlarging "the time for the execution of the *contracts* heretofore entered into between this board and B P, and John Kinkle, for the payment of their debts to this Bank, in state bonds," does not show, in the absence of proof to the contrary, that the previous proposition had been assented to.—*Ib.*..... 623

See *Construction*, 4.

CORPORATIONS.

1. A rail road corporation, by its charter, was prohibited from emitting for circulation, any notes or bills; or to make contracts for the payment of money, except under its corporate seal, and then alone for debts contracted by it. The rail road corporation subsequently made a contract with the Branch Bank of the State of Alabama at Montgomery, by which the latter agreed to receive in payment of debts, and pay out in circulation, such notes as the former should issue in payment of its debts. The rail road corporation issued certain bills single, in sums from one to twenty dollars; engraved as bank notes, in payment of debts due from it, and these were received by the Bank under its contract with the rail road corporation. Afterwards, the Bank loaned the bills single thus received on certain bills of exchange, at the request of the borrower; the bills being made for the purpose of effecting the loan. *Held*, that these transactions on their face were not illegal, so as to prevent the Bank from recovering in a suit on the bills of exchange. If the bills were lawfully issued by the rail road corporation, they could be lawfully received by the Bank, and again loaned by it. But if the contract was a mere pretext, to avoid the prohibition of the charter, it would be void, and the bills single invalid in the hands of any one connected with the illegal contract. The validity, or invalidity of the transaction, depends upon the intention with which the bills single were issued and received, and that is a question for the jury.—*Branch Bank at Montgomery* v. *Crocheron, et al.*..... 250
2. When a statute prohibits the making by any person or corporation of any note, bill single, &c. for a less sum than three dollars, to subserve the common uses of money, and punishes the offence by fine; and the circulation is also punished by fine; the passing of such notes does not necessarily avoid a contract for the loan of money, when the contract is not for the loan of such notes. The rule is, that a contract with reference to the prohibited matter is void; but if the contract is innocent, and in carrying it out, there is a violation of the statute, this does not avoid the contract, though the offender may be punished for a violation of the law.—*Ib.*..... 250
3. An agreement by the Branch Bank of the State of Alabama, to receive such bills as a rail road company could lawfully issue, and to pay the same out as circulation, will not avoid a recovery on bills of exchange, given for the loan by the Bank of such bills, as being contrary to the policy of the laws of the State, with reference to its banking institutions.—*Ib.*..... 250
4. If a corporation is empowered by an amendment to its charter, to draw bills of exchange, and afterwards draws a bill; an acceptance of the amended charter will be presumed without showing any direct act of acceptance by the corporation or its authorised agents.—*Wetumpka and Coosa Rail Road Company* v *Bingham*..... 657

5. An action will lie to recover a subscription for stock in an incorporated company, although the charter declares, that upon the failure of the subscriber to pay any requisition made by the directors thereon, his stock "shall be forfeited to the company, with the instalments which may have been paid, &c." The right to claim the forfeiture, and the proceedings consequent thereupon, are merely a cumulative remedy.—*Selma and Tennessee Rail Road Company* v *Tipton*. 787
6. In an action by a corporation, the declaration need not *specially* allege a compliance with every particular circumstance relating to its organization, which is required, in order to its becoming invested with the privileges and powers conferred by its charter. Although it may be necessary to prove these matters specially, the allegation may be more general.—*Ib*..... 787
7. A regular subscription for shares in the stock of an incorporated company, whether made previous to its organization or not, if it organizes as provided by the charter, imports in itself a sufficient consideration, and may be declared on as the foundation of an action.—*Ib*..... 787
8. *Semble:* Presumptions are applicable as well to corporations as individuals; persons acting publicly as officers of the corporation are presumed rightfully in office; and the performance of all necessary steps presumed, in order to make a corporate act legal.—*Ib*.....787
9. Where the act creating a corporation provides, that its members, or they who may become such, shall organize before their corporate existence is complete; in an action to recover the price of stock subscribed for, previous to their organization, the defendant by an appropriate plea, may throw upon the plaintiff the burthen of showing a compliance with the requirements of the charter. *Ib*. 787
10. *Semble*: That a legislative charter, or rather the privileges and powers conferred by it, cannot be adjudged void and inoperative in an indirect proceeding; but this can only be done in a proceeding instituted at the suit of the State, with a view to such object.—*Ib*..... 787
11. Not only estoppels, technically so called, but estoppels *in pais*, operate both for and against corporations.—*Ib*..... 787
12. Where the charter requires that a subscriber for stock in an incorporated company, shall pay five per cent. on the amount at the time of his subscription; if instead of making the cash payment, he gives his note therefor, participates in the organization of the company, becomes one of its directors and pays his note; he cannot afterwards insist as a defence to an action to recover an instalment, that he did not pay the *five per cent.* at the time of subscribing.—*Ib*.....787
13. A subscriber for stock in an incorporated company, to whom the charter does not accord that privilege, cannot withdraw from the company, and thus avoid the liability to pay for it...*Ib*..... 787

See *Garnishee*, 1.

COSTS.

1. The assignor of a note is liable to the assignee for the costs of the suit prosecuted against the maker of the note.—*Hammett* v. *Smith*.....156
2. The several acts which authorise a court to tax a prosecutor, with the costs of the prosecution, extend to cases of misdemeanor only, and even in

such, the record must disclose that the prosecution appeared to the court to be frivolous or malicious.—*Burns* v. *The State*..... 227

3. Although it is not competent to revise on error, a question of law reserved by bill of exceptions upon the trial of an issue out of chancery; yet as the question is a novel one in our courts, it may be regarded as sufficiently "substantial," to authorise an appellate court to look into, and vary a decree as to costs, if incorrect.—*Alexander, by his guardian*, v *Alexander*..... 517
4. The guardian of a lunatic, who has a just pretence for suing, and has conducted himself fairly, is not chargeable with costs, although unsuccessful in the suit; and where he is charged with them, an appellate court will correct the decree on writ of error, if some other substantial ground of appeal be joined, and charge the estate of the lunatic with the entire costs.—*Ib.* 517
5. The commissions allowed by law, upon the levy of a *fieri facias*, should not be taxed by the clerk in the bill of costs.—*The Oswitchee Co.* v *Hope & Co.* 629
6. It is competent for a party, at whose suit civil process issues, to suspend its energy, by directing the sheriff not to execute it; and where the sheriff is instructed not to levy a *fi. fa.* until further orders, or to hold it merely to bind the debtor's property, in neither case, can the officer claim fees for the disobedience of instructions.—*Ib*..... 629
7. A motion to the court to adjudge to the sheriff, costs upon an alleged levy of a writ of *fi fa.* even if grantable under the facts of the case, should be preceded by a notice to the defendant in execution; and an order made in such case, will be considered as so far void, that the court making it, may quash an execution issued thereon.—*Ib.*..... 629

See *Practice at Law*, 15.

COURT—CHARGE OF.

1. A charge that the owner of goods is bound in consequence of a stipulation entered into by consignees, in their own names, is erroneous, although the owner is bound by receiving the goods, inasmuch as the verdict may have turned on the charge.—*Eckford* v. *Wood, et al*,..... 136
2. If a charge is considered objectionable on account of supposed obscurity or tendency to mislead the jury, those against whom it is to operate must ask an explanation of the court, otherwise this court will not reverse for that cause, if the charge is substantially correct.—*The State* v. *Brinyea*..... 242
3. A court is not bound to charge a jury, unless there be evidence to which the charge may have relation, or on which it may be founded.—*Thompson* v *Armstrong, use, &c* 383
4. It is not error in a court to refuse to admit proof which is merely affirmative of the legal interpretation of a writing adduced as evidence; if either party desire an opinion from the court, as to the meaning or effect of the paper, it should be sought by a prayer for instructions to the jury, or in some other mode equally direct, unless the court by its decision renders this course of procedure unnecessary.—*Sims & McQueen* v. *Pryor & Saxon*,.....592
5. Where the court agrees to give an erroneous charge, if the party asking it will do an act which the court has no power to require him to do, it is error, as it is impossible to know that the party has not been injured thereby.—*Sherrod* v. *Rhodes*..... 684

6. Where writings are not so ancient that they cannot be proved by living witnesses, it is not allowable to prove the hand-writing of a party, by a mere comparison of the disputed paper with a writing admitted, or proved to be genuine. But when in the course of the trial, such evidence is admitted at the instance of the State, the error may be cured, by the court instructing the jury that the evidence was illegal, and should not be regarded by them.---*The State* v. *Givens*..... 747

See *Criminal Cases and Proceedings in*, 8, 9.

COURT—SUPREME.

1. Objection cannot be made in this court, that the plea was *non assumpsit* instead of *nil debet*....*Conklin* v. *Harris*..... 213

CROP, GROWING.

1. A growing crop has such an existence as to be the subject matter of a sale, mortgage, or other contract, which passes an interest to vest in possession, either immediately or at some future period.—*Adams* v. *Tanner and Horton* 740
2. The act of 1821, which declares that it shall not be lawful to levy an execution on the planted crop of the defendant until it is gathered, prevents the lien of a *fi. fa.* from attaching until that event: and if previous to that time the defendant makes a *bona fide* sale, or other disposition of his growing crop, the execution creditor cannot subject it to the satisfaction of his judgment, when it is severed from the soil.—*Ib*.....740

COVENANT.

1. In a declaration upon a covenant, and performance necessary to be averred by the plaintiff, if the act to be performed involve a question of law, the *quo modo* must be pointed out; otherwise performance may be averred generally. *Sorell and Adams, ex'rs, &c.* v. *Sorell*..... 576
2. The assignment of the breach in covenant must conform to the covenant of the defendant, as set out; the breach must not be for more than is covenanted to be performed.---*Ib*.....576
3. The words "grant, bargain, sell," must all be used in a deed, to imply a covenant of the grantor, against incumbrances, done or suffered by him, within the meaning of the "act respecting conveyances," sec. 20, approved March 4th, 1803..*Gee* v. *Pharr*.....586
4. "A covenant in a bond for title to land, that H W B, and M B, his wife, shall well and truly convey, and make a fee simple title to the land to the said M," upon the payment of the purchase money---only bound the wife to relinquish her dower, and did not bind her individually to make title to the lands; nor was the surety to the bond bound for her acts, further than she was bound herself....*King and Barnes, adm'rs* v. *Moseley*.....610

DAMAGES.

1. The damages of six per cent. authorised to be imposed when an injunction is obtained for delay, cannot be allowed by the chancellor, unless the facts stated in the bill are shown to be untrue, or evasive, and cannot therefore be allowed when the bill is dismissed for the want of equity....*Crawford* v. *The Bank of Mobile*..... 55

2. The damages in an action of trespass to try title, cannot be lessened or mitigated by evidence that the plaintiff paid an inadequate price for the land sought to be recovered....*Love and Williams* v. *Powell*. 58

See *Trespass to Try Title*, 1.

DEED AND REGISTRATION OF.

1. A sheriff's deed is conclusive, and cannot be impeached on a collateral issue, except for fraud in its execution, whenever the process under which the land is sold, is supported by an existing operative and unsatisfied judgment....*Love and Williams* v. *Powell*..... 58

2. Where a deed is witnessed by three persons, two of whom reside out of the state, and the other is dead, proof of either of the witnesses hand writing to the deed is *prima facie* sufficient to allow it to be read to the jury....*Thomas* v *Wallace*. 268

3. A deed conveying land and personal property in trust, to pay debts, cannot be used in evidence on the certificate of the clerk that it was acknowledged or proved to have been executed before him, but the fact of its execution must be established by proof *aliunde*.....*Ravisies* v. *Alston, trustee*..... 297

4. A deed cannot be excluded by the court, because of alterations or erasures apparent on its face...*Ib*.....297

5. The acts of 24th January, 1829, of the 10th January, 1831, of the 18th January, 1832, of 10th January, 1835, and of the 25th December, 1835, extending the time for the registration of deeds, are registry acts merely, and were not intended to repeal, modify, or change the act of the 11th January, 1828, for the prevention of frauds....*Cummings & Cooper* v. *McCullough, adm'x*. 324

6. Deeds of assignment of property in trust to pay creditors, are embraced by the terms of the act of the 11th January, 1828....*Ib*.....324

7. Where one person makes a quit-claim deed to another, and afterwards obtains a patent for the same land, it seems that the title of the patentee does not inure to the person to whom he has quit claimed, as it would if he had conveyed with a warranty of title.—*Tillotson* v. *Doe, ex demise Kennedy*.....407

8. Where there are three subscribing witnesses to a deed, one of whom is dead, another resident out of the State, and a third one being called is not able to prove the delivery, the execution of the deed may be proved by other persons, and it is not indispensable to prove the hand-writing of the absent witnesses. *Lazarus* v. *Lewis*.....457

9. A deed or conveyance, for the absolute sale of property, which is fair upon its face, cannot be excluded from the jury, notwithstanding there may be facts in evidence, which might show it to be fraudulent in legal contemplation: when the evidence of fraud is not disclosed by the deed itself, but furnished by parol evidence in connection with it, it becomes a mixed question of law and fact, and a jury must interpose....*Planters' and Merchants' Bank of Mobile* v, *Borland*..... 531

See *Evidence*, 11.
See *Gift*, 1.
See *Covenant*, 3.

DEMURRER.

1. The statute abolishing special demurrers, does not apply to pleas in abatement. *Elmes & Co.* v. *McKenzie*.....617

See *Pleading*, 13.

DEMURRER TO EVIDENCE.

1. Where the holder of a bill of exchange resided in Mobile, and the endorser in Tuskaloosa, the deposite in the post-office of the latter place, by an agent, of notice of the dishonor of the bill, will not be sufficient to charge the endorser unless it actually comes to his hands.—*Foster* v *McDonald*..... 376
2. Upon proof of these facts, a jury might infer that the endorser received the notice, if no countervailing fact is shown to destroy the presumption, and upon a demurrer to the evidence, the court will so decide.—*Ib*..... 376
3. Upon a demurrer to evidence, no objection can be taken to its competency.—*Ib*..... 377

DEPOSITIONS.

1. Where a commission requires a deposition to be taken on a certain day, between the hours of 10 o'clock, A. M. and 4 P. M., and it appears to have been taken on the day designated; the *prima facie* presumption is, that the commission was executed within the appointed hours: and this seems to be the law, although the caption or certificate neither affirm such to be the fact.—*Dearman* v. *Dearman, guardian, &c*..... 202
2. Where a commission directs the deposition of a witness to be taken on a day designated, within certain hours, and the commissioners certify, that pursuant to the annexed commission, they have caused the witness to come before them, between the hours therein stated, &c.: Although their certificate is not dated, it must be inferred, that the witness was examined on the day stated in the commission.—*Luckie* v. *Carothers*..... 290
3. When depositions of witnesses are taken as residing more than one hundred miles from the place of trial, the distance is to be computed by the usual and customary land route, although there is a more convenient, and therefore a more usual route of greater distance by the river.—*Marston* v. *Forward*.....347
4. The deposition of a practising physician, under the act of January 28, 1840, or of a witness residing out of the State, may be taken, either by way of interrogatory or otherwise, as the party desiring the testimony may elect.—*Adm'rs of Alexander* v. *The Branch Bank at Montgomery*.....465

DETINUE.

1. Service of the writ is a sufficient demand in an action of detinue. It may be necessary to prove a previous demand, where the plaintiff seeks to recover damages from a day before suit brought.—*Vaughan* v. *Wood*..... 304
2. In detinue, on proof of demand and refusal, to deliver the property, it is not competent to prove what the defendant said in relation to his title, to the property in controversy.—*Brown* v. *Brown*..... 508
3. The judgment of the court, in detinue, should be for the recovery of the specific property, or its value assessed by the jury, in the alternative.....*Ib*... 508

DISCONTINUANCE.

1. Where a writ is sued out against two joint makers of a promissory note, and served on one only, but the declaration is against both, it is not necessary to enter a discontinuance on the record, as to the party not served with process; if no judgment is rendered against him, this is, in legal effect, a discontinuance,

and the judgment against the defendant before the court will be regular.—*Oliver* v. *Hutto, use, &c.*..... 211
2. When an action is commenced against three jointly, continued as to two, and judgment rendered against the third—the entire action is discontinued.—*Givens* v. *Robbins & Painter*..... 676

See *Practice at Law*, 12.

DIVORCE AND ALIMONY.

1. Upon a bill filed for a divorce by the wife, in which she does not claim alimony, no decree can be made in favor of the husband, on his answer for money paid by him for the debts of the wife, contracted before marriage. If such a decree can be made in any case, it must be on a cross bill filed by the husband. *Oliver* v. *Oliver*..... 75
2. When it appeared that the husband had made a settlement for the separate use of the wife and her children, by a former marriage, it might be proper for the chancellor to refuse relief to the wife applying for a divorce, (although he could not decree in favor of the husband) until she made a re-conveyance of such separate estate.—*Ib.*..... 75

ELECTION.

1. An issue for the trial of the right of property, under the act of 1812, (Aik. Dig. 167,) is a suit at law, within the meaning of the 21st rule of practice in chancery, (1 Stewart's Rep. 618,) and the plaintiff in execution is bound, on the suggestion and affidavit of the claimant, to elect between the dismission of such case, and a bill in chancery for the same claim or demand.—*Planters and Merchants' Bank of Mobile* v. *Borland*..... 531
2. The objects of the rule were to diminish litigation, and lessen its expense, and the claimant may, at the earliest moment after the two suits in law and chancery are commenced, for the same claim or demand, make his suggestion, and call for the election of the plaintiff.—*Ib.*..... 531
3. The powers of the courts of law and chancery are concurrent, over such applications—and the tribunal first applied to may act.—*Ib.*..... 531
4. Where the plaintiff, under the coercion of a court of law, to elect whether he will proceed in that tribunal or in chancery, dismisses his suit in equity for the same identical cause; he cannot on writ of error brought to revise the judgment in the case against him at law, insist that the forced dismissal of his suit in equity was irregular. That proceeding did not enter into, or in any manner affect the judgment in question.—*The Planters' and Merchants' Bank of Mobile* v. *Willis & Co*..... 770

ERROR, AND WRIT OF.

1. When the record shows that the jury passed upon an "issue joined," if it does not appear from the record what the issue was, this court will intend that it was an issue formed upon the proper plea.—*Smith, et als.* v. *The Branch Bank at Mobile*..... 26
2. When a judgment is rendered against sureties in a summary manner, as was formerly the case in this state, upon forthcoming bonds; or as was here irregularly rendered against the sureties on the administration bond, such a judgment is distinct and separate from, and cannot be connected with the previ-

ous judgment, by suing out a writ of error. When a writ of error is sued out in the names of the sureties, it only removes the judgment rendered against them... *Clarke* v. *West, et al*..... 117

3. When a judgment is rendered against an administrator, upon a final settlement of an estate, reported insolvent, in favor of several creditors, all of them must be made parties to the writ of error sued out by the administrator, to revise the final decree.—*Ib*..... 117
4. Where one of two defendants prosecutes a writ of error, from the county to the circuit court, and the judgment of the county court is there affirmed, it cannot be assigned for error in this court, that the circuit court should have dismissed the writ of error prosecuted from the county court.—*Richards and others* v. *Griffin*..... 195
5. The term "award," used in the condition of a writ of error bond, instead of of "*judgment*" of the court, is sufficient, the legal effect being the same.—*Ib* 196
6. When a judgment is affirmed on writ of error, it is error to compute the interest then due on the judgment, and render judgment for the aggregate amount in the appellate court, as that would be compounding the interest.—*Ib*. 196
7. No execution can issue on a decree of the county court, rendered in favor of "the legatees of Philip Joseph," nor can a writ of error be prosecuted against them by that appellation, it not appearing in the record who the legatees of Philip Joseph are.—*Joseph, adm'r* v. *The Legatees of Joseph*..... 280
8. A plaintiff in execution stated to the court in writing, that the sheriff had collected of a defendant a large sum of money on executions in his hands, (some of which were in favor of the plaintiff,) and concluded with an affirmation that the money should be applied to the satisfaction of his judgments and executions; *Held*, that although the plaintiff might have moved against the sheriff, for the failure to pay over the money upon his executions, yet upon the suggestion made, no judgment could be rendered against the sheriff, on which a writ of error could be sued out.—*Henderson* v. *Richardson*..... 349
9. The refusal to continue a cause, cannot be reviewed on error, in chancery, any more than at law.—*Evans* v. *Bolling*..... 551
10. A writ of error will not lie to revise an order dissolving an injunction—the remedy in such case being by appeal under the act of 1836; and if a judgment of affirmance is rendered on certificate, against the plaintiff in error and his sureties, it will be regarded as a nullity, and may be set aside at the succeeding term, on motion of one of the sureties.—*Exparte, Sanford*..... 562
11. The act to authorise the amendments of writs of error, requires the writ to be amended in all cases, where it is necessary to make it conform to the record.—*Lunsford, et al.* v. *Richardson & O'Neal*..... 618
12. A writ of error will lie, to revise the judgment of a court overruling a motion to quash a forthcoming bond, so as to avoid an execution issued thereon; and although the execution has not been made part of the record by bill of exceptions, or otherwise, it will be looked to by the appellate court, to ascertain if it is correctly described in the condition of the bond.—*Ib*..... 618
13. An irregularity in the issuing of an execution, does not warrant the reversal of the judgment; if unauthorised by the judgment, or defective, or not legally enforceable, its action may be arrested by some direct proceeding.—*Cloud* v. *Golightly's adm'r*..... 654
14. Where a writ of error is prosecuted by the defendants in a cause in chance-

ry, a part of them cannot assign that for error which only affects their co-defendants....*Barker, et al.* v. *Callihan*. 708

15. J A T and B F T sue out a writ of error, and enter into bond with surety for its successful prosecution; in the Supreme Court the writ of error is amended by striking out the name of B F T, so as to make it conform to the judgment of the circuit court, which is against J A T alone: *Held*, that the Supreme Court could render no judgment against the surety upon his bond, as B F T, one of his principals, had ceased to be a party to the cause, by order of the court. Whether a recovery could be had against the surety upon his bond as a common law obligation, *quere*?..*Tarver* v. *Nance*. 712

See *Mandamus*, 11.

See *Amendment*, 1.

See *Right of Property—trial of*, 6.

See *Garnishee*, 12.

See *Criminal Cases and Proceedings in*, 14, 17.

See *Election*, 4.

ESTOPPEL.

1. Not only estoppels, technically so called, but estoppels *in pais*, operate both for and against corporations.—*Selma and Tennessee Rail Road Company* v. *Tipton*..... 787

EVIDENCE.

1. In a contest between a creditor and one claiming by deed from the debtor, the consideration is not proved by the recital in the deed, but must be shown by extrinsic evidence.—*The Branch Bank at Decatur* v. *Kinsey*..... 9

2. It is not sufficient to establish the interest of a witness, to show that he had told a third person, that one half of the debt for the recovery of which the action was brought, was coming to him (witness) and under his control; such proof does not exclude the inference that his right to receive the money and control the suit, was not as an attorney or agent.—*Densler, ex'r &c.* v. *Edwards, use, &c*..... 31

3. Evidence that the defendants kept a small grog-shop, about which negroes resorted, with other circumstances conducing to show that an unlawful traffic was carried on by them with slaves, by receiving from them stolen goods, is not proper to go to the jury, to prove that the defendants, and other persons with their permission, incited the slave of the plaintiff to steal, or employed him as an instrument in their unlawful traffic, without further proof, in some way connecting the slave of the plaintiff with these unlawful acts.—*Rasco & Brantley* v. *Willis*..... 38

4. The declarations of a nominal plaintiff made before he had parted with his interest in the note, the foundation of the action, are admissible evidence; and where there is no proof of the time when another person became the beneficial proprietor of the note, declarations made at any time before suit brought will be received.—*Sally, use, &c.* v. *Gooden*..... 78

5. When plaintiffs introduce a record showing payment under a decree made at a certain time, it is not competent for them to dispute the conclusiveness of the record as to the time.—*Eckford* v. *Wood, et al*.....136
6. The defendant called for an account of sales of his cotton, which was in the plaintiff's possession, and upon its being produced, offered it as evidence for the single purpose of showing when the sale was made: *Held*, that the use of the paper by the defendant, was an admission of its genuineness, and made it admissible for the plaintiff to prove the facts shown by it.—*Young* v. *The Bank of the State of Alabama*.....179
7. In a suit against a surety, the principal is not a competent witness, unless released from the payment of costs.—*Richards and others* v. *Griffin*.....196
8. When the borrower, is offered as a witness, to prove usury, he is in the first instance offered to the court with a statement of what he will prove, that the creditor may, if he thinks proper, deny it. When, therefore, the record shows that the borrower was offered as a witness, generally, it must be presumed that he was offered as a witness to the jury, and not to prove the fact of usury specially. *Ib*.....196
9. A receipt acknowledging the payment of money, is open to explanation by parol proof, showing that the money, either from mistake, misrepresentation, or from some other cause, was not in fact paid.—*Saunders* v. *Hendrix*.....224
10. An acknowledgment in the body of a deed, that the consideration money was paid, is considered as a receipt for money merely, and open to explanation by parol proof as any other receipt for money.—*Ib*.....224
11. When a receipt on the back of a note is so unintelligible, that it is doubtful whether it acknowledged the payment of one hundred or one thousand dollars, it is void for uncertainty, and parol proof is admissible to show the sum actually paid.—*Ib*.....224
12. It will not be inferred in the absence of proof, that where one person pays a debt for another, that he acts as the agent of the debtor, and advances his own money for him.—*Stephens* v. *Brodnax & Newton*.....259
13. Where there is conflicting evidence upon a point, no matter how strongly it inclines to a certain conclusion, the court should refer it to the jury to determine what it proves.—*Vaughn* v. *Wood*.....304
14. Upon an issue to a plea that a note was given without any consideration, the note is *prima facie* evidence of a consideration.—*Parkman & Stringfellow* v. *Ely*.....346
15. A memorandum shown to have been made by the father of a child, of the time of its birth, would, after his death, be evidence of the date of its birth, as a declaration *ante litem motam;* but not if the father were living and able to testify. *Blann* v. *Beal*.....357
16. Where in an action of trespass *quare clausum fregit*, the plaintiffs to show their right to maintain the action in their joint names, introduced a deed by which one conveyed to the other, an interest in the land on which the trespass was committed, and offered to prove its execution by proof of the genuineness of the signatures: *Held*, that as the defendant was neither a party or privy to the deed, it was necessary to prove that the deed was executed when it bore date,

or at least that it existed at the time of the commission of the alleged trespass. *F. R. and G. Baker* v. *Blackburn*.....417

17. Where an attorney at law acknowledges in writing, that he has received a promissory note for collection, the rule of law which forbids that verbal evidence shall not be admitted to contradict a writing, will not prevent a creditor of the holder of the note, from proving by the attorney, that he was directed to pay it to him when collected.—*Echols v. Exum*..... 419

18. A party who sets up a title must furnish the evidence necessary to support it; and if the validity of a deed depends on an act *in pais*, the party claiming under it, is bound to prove the performance of that act.—*Pope* & *Hamner* v. *Headen*.....433

19. Proof of the hand writing of the justice who took the affidavit and issued the warrant to arrest the plaintiff, at the instance of the defendant, will be sufficient evidence, *prima facie*, of the authority under which the arrest was made.—*Sturdevant* v. *Gains*.....435

20. A search of half an hour by a lawyer in his office for a paper which was there three days before, without finding it, will raise a presumption of its loss, and authorize secondary evidence of its contents, especially in a case where no doubt could exist as to its contents. Nor in the absence of proof indicating that it might be found elsewhere, would it be necessary to search elsewhere for it.—*Ib*..... 435

21. In a proceeding against a constable and his sureties by notice, to recover money collected by the former on execution, the plaintiff is not entitled to recover, upon proof that a constable had levied an attachment in his favor, and that the defendant therein had placed in the constable's hands, money, or property, to indemnify him for a liability incurred by the failure to take a replevying, or bail bond. Perhaps an action would lie in such case for a breach of official duty.—*Johnson et al.* v. *J.* & *B. F. Petty*.....528

22. Payment of drafts, or checks, and in some cases, payment of judgments or executions, may be proved by parol evidence, without producing such written or record evidence, or accounting for its absence—the necessity of producing such evidence, exists when the deed, agreement, &c., form part of the issue, or become material to the issue.—*Planters' and Merchants' Bank of Mobile* v. *Borland*..... 531

23. A written acknowledgment by an acting executor, that a claim was presented within the time required by law, is evidence of the fact of presentment; and the subsequent resignation of the executor, will not impair its value as evidence, and make it necessary to call the executor as a witness.—*Starke* & *Moore* v. *Keenan's ex'rs*..... 590

24. Whether the *declarations* of one as to the ownership of goods, of which he has the possession, cannot be given in evidence—*quere*.—*Gary, et als.* v. *Frost* & *Dickenson*..... 636

25. Where a witness testifies positively, that he was called on to attest a contract between the parties, his evidence should outweigh the testimony of many witnesses, who state collateral facts and circumstances which are inconclusive and at most only persuasive.—*Todd* v. *Hardie, et al*..... 698

26. Where it is doubtful from the proof, whether personal property was sold, or mortgaged, the evidence that the sum advanced was greatly below its value, would be entitled to much weight....*Ib*..... 698

27. *Semble;* where the burthen of proving the fairness of a sale made by a sheriff, is thrown upon a defendant, he may inquire whether the property did not sell for as much as such property usually brought at sheriff's sale.—*Wyatt* v. *Clepper*..... 703

28. The fact whether a party was embarrassed, where it is a direct and material inquiry in the cause, cannot be proved by common reputation; but if his embarrassment is shown, by proper evidence, it seems that common reputation is admissible, to bring home a knowledge of the fact to one who resides near him, or who is acquainted with the state of his affairs.—*The Branch Bank at Montgomery* v. *Parker*..... 731

29. Where writings are not so ancient that they cannot be proved by living witnesses, it is not allowable to prove the hand-writing of a party, by a mere comparison of the disputed paper with a writing admitted, or proved to be genuine. But when in the course of the trial, such evidence is admitted at the instance of the State, the error may be cured, by the court instructing the jury that the evidence was illegal, and should not be regarded by them.—*The State* v. *Givans* 747

30. A paper which is copied into an indictment for forgery, but touching which there is no allegation, and which can have no influence in determining, whether the defendant is guilty in respect to the forgery charged, is irrelevant to the issue, and cannot, upon proof that the defendant admitted its genuineness, be laid before the jury, that by a comparison with it of the note alleged to be forged, they may say, whether they were both written by the same hand....*Ib*.....747

31. Where no evidence is adduced to show that the defendant is guilty of the forgery of a note, as charged, it is not allowable for the jury to compare the note with a paper admitted to be written by the defendant, and if satisfied of the sameness of the hand-writing, to convict him of the offence....*Ib*..... 748

32. The claimant of property to make out his title, offered in evidence a mortgage, which had become absolute; he also adduced his own affidavit, admitted by the consent of the plaintiff, stating that R M, was a subscribing witness, to a conveyance of the property in question, made by the defendant in execution to the claimants. The mortgage produced was attested by R M; Held, that the mortgage was *prima facie* the *conveyance* to which the affidavit referred; and if the affidavit was insufficient to identify it, evidence was admissible to show, that R M, who is named in the affidavit, is the same who attested the mortgage, and that but one mortgage was executed to the claimant.—*The Planters' and Merchants' Bank of Mobile* v. *Willis & Co*..... 770

33. A witness may testify that a sum of money was paid in a draft on a foreign bank by a third person to one of the parties in the cause, although the draft was not produced at the trial—the positive knowledge of the witness and the presumption that the draft has been taken up by the bank, are sufficient reasons for dispensing with its production....*Ib*..... 771

34. Where a witness states that he purchased property for another, under the authority of a letter from the latter, he cannot be permitted to give parol evidence of the contents of the letter, until he has satisfactorily accounted for its absence.*Ib*. 771

35. A surety of the claimant of property in a bond given for the trial of the right, cannot refuse to give evidence for the plaintiff in execution, on the ground of his suretyship....*Ib*..... 771

See *Practice* 3.
See *Principal and Agent*, 1.
See *Bank*, 7.
See *Pleading*, 9.
See *Sheriff and Suretics*, 12, 13.
See *Contract*, 7.

EXCEPTIONS, BILL OF

1. Where the points presented by the bill of exceptions are reserved at the trial, but the bill itself is not drawn up and sealed until six months thereafter, the appellate court, notwithstanding the delay in perfecting the bill, will consider it as a part of the record; and this, although no note of the point was made by the judge when the exception was taken.—*Pool* v. *The Cahawba and Marion Rail Road Company*..... 237
2. Where it is stated in a bill of exceptions that a charge was prayed upon certain evidence, it will not be intended, in order to legalize the charge, that other evidence was adduced.—*Stephans* v. *Brodnax & Newton*..... 258
3. When a bill of exceptions is allowed in a criminal case, the facts embodied in it become a part of the record; and if a writ of error is allowed, it brings up the entire record, and error may be assigned on any part of it....*The State* v. *Jones*. 666

EXECUTIONS, WRIT OF

1. Where different creditors claim a priority of lien for their respective executions, and one of them moves against the sheriff and his sureties, so as to coerce an appropriation of the money to the satisfaction of his *fi. fa.* although the other creditor may have the prior lien, yet the party submitting the motion is entitled to a judgment for the excess of money in the sheriff's hands. But, if the plaintiff in such case, have returned the facts specially to the court, and asked its direction thereupon, he will be relieved from the payment of damages and interest. *Wood* v. *Gary, et al*..... 43
2. A writ of *fieri facias* being returnable to the first Monday in April, the direction of the plaintiff to the sheriff on the 25th March preceding, to return it, will not render it *dormant*, or impair its *lien*, as it respects an execution of a junior judgment creditor subsequently issued, unless such return was made when the execution might have been satisfied and with interest to favor the defendant in execution—*Ib*..... 43
3. An *alias* issued upon the judgment in such a case, will continue the *lien* of the first execution, if there has not been a lapse of an entire term intervening, and overreach an execution issued on a junior judgment before such *alias*, if the *alias* comes to the sheriff's hands before a sale of property under the junior execution...*Ib*..... 44

4. When personal property of the defendant in execution is brought into the county after executions of different judgment creditors have come to the sheriff's hands against such defendant, the eldest judgment creditor who has preserved his *lien* will have the prior right...*Ib*..... 44
5. A levy on goods and seizure by the sheriff, is no satisfaction of the execution, if the goods are restored to the defendant upon the execution of a delivery bond. *Crawford* v. *The Bank of Mobile*..... 55
6. Where the defendant in execution, after the same has been levied on personal property of sufficient value to satify it, assents to the assignment of the judgment to a third person, it may be inferred that all further proceedings under the levy were suspended, and that the property was returned to the defendant's possession, if it had been removed; in fact it may be questioned whether the defendant's assent would not estop him from insisting upon the discharge of the judgment by any thing done by the sheriff previous to its assignment, and impose on him the necessity of re-possessing himself of the property levied on. *Haden, et al* v. *Walker*.....86
7. When a judgment has been assigned, the assignee may sue an execution thereon in the name of the plaintiff, and independently of his control....*Ib*..... 86
8. Where the sheriff returns an execution thus, "the defendants in this case have settled with plaintiff's attorney, as per order of same—costs and commissions paid to sheriff," a subsequent execution cannot issue without the authority of the the court...*Ib*..... 86
9. *Quere*—Is it competent for the sheriff to indorse a return upon an execution in any other form than the statute prescribes?..*Ib*..... 86
10. Where the points presented by the bill of exceptions are reserved at the trial, but the bill itself is not drawn up and sealed until six months thereafter, the appellate court notwithstanding the delay in perfecting the bill, will consider it as a part of the record: and this, although no note of the point was made by the judge when the exception was taken...*Pool* v. *The Cahawba and Marion Rail Road Company*.....237
11. No execution can issue on a decree of the county court, rendered in favor of "the legatees of Philip Joseph," nor can a writ of error be prosecuted against them by that appellation, it not appearing in the record who the legatees of Philip Joseph are—*Joseph, adm'r* v. *The legatees of Joseph*..... 280
12. A direction by the plaintiff to the sheriff, not to levy several executions which had successively issued, will not render a subsequent execution upon which no such direction had been given, *dormant*, as against creditors of the defendant, claiming under a deed of trust, made after the last execution came to the sheriff's hands.—*Branch Bank at Huntsville* v. *Robinson, sheriff*..... 623
13. It is competent for a party, at whose suit civil process issues, to suspend its energy, by directing the sheriff not to execute it; and where the sheriff is instructed not to levy a *fi. fa.* until further orders, or to hold it merely to bind the debtor's property, in neither case, can the officer claim fees for the disobedience of instructions.—*The Oswitchee Co.* v *Hope & Co.*..... 629
14. A motion to the court to adjudge to the sheriff, costs upon an alleged levy of a writ of *fi. fa.* even if grantable under the facts of the case, should be preceded by a notice to the defendant in execution; and an order made in such case, will

be considered as so far void, that the court making it, may quash an execution issued thereon.... *Ib*..... 629

15. Where an execution is superseded upon a petition filed in vacation, it is not necessary for the defendant in execution to move the court to quash it; the petition itself, is a motion to that effect, and may be so considered even where a *supersedeas* has improvidently issued....*Ib*.....629

See *Statutes*, 8.

See *Lien*, 6.

See *Mortgagor and Mortgagee*; 4, 7.

See *Bankrupt*, 3.

EXECUTORS AND ADMINISTRATORS.

1. The statute of non-claim [Dig. 153, § 6] creates a complete bar, by the omission to exhibit the demand to the administrator within eighteen months, in all cases not excepted by the statute, whether the administrator does or does not make publication, as required by another section of the same act; [Dig. 180, § 12] and therefore a replication to a plea of *plene administravit* is bad, when it offers an issue upon the fact of advertising....*Thrash* v. *Sumwalt*..... 14

2. Where one takes possession of goods left by a deceased person, under a claim which is colorable and fair, he is not liable as an executor *de son tort*....*Ib*.. 31

3. A person who is in possession of goods, after the donor or grantor's death, under a fraudulent deed of gift or other conveyance, in respect to such goods, he is chargeable as an executor *de son tort*.—*Ib*..... 31

4. Where a person takes possession of the property of a decedent in one State, under circumstances which would there render him liable as an executor *de son tort*, and removes it, or sells it, and removes without accounting for the money, he may be sued in that character wherever he is found, even in another jurisdiction....*Ib*..... 31

5. Where a judgment is obtained against an administratrix in a suit where she is the plaintiff, (under our statute of set-off; Aik. Dig. 181, § 174,) upon the certificate of the jury, that the plaintiff is indebted to the defendant, and she is afterwards sued on a *devastavit*, such judgment raises no presumption of assets in her hands.—*Quigley* v. *Campbell & Cleaveland*..... 76

6. Although a statute allows an execution to be issued against the sureties upon an administration bond, upon the return of "no property" to one issued against the administrator upon a decree of the Orphans' court, yet it is erroneous for that court to render a judgment against such sureties without suit. The execution does not conclude the parties, and they have the right to test the legal sufficiency of the bond, but the manner of so doing is not yet clearly settled.---*Clarke* v. *West*, *et al*..... 117

7. The consequence of a report of insolvency, is to make the administrator of the estate the *actor* in the proceedings: the effect of it is to discharge him from the suits of the creditors who are then entitled to have the assets divided amongst them. The administrator is therefore bound to take notice of all the subsequent proceedings by the court in the settlement of the estate, and no notice to him of the time of settlement is necessary. Creditors are properly notified by publica-

tion in some newspaper for forty days, and the place is the court-house where the settlement is made by the judge, and need not be stated in the notice.—*Ib* 117

8. On the final settlement of an insolvent estate, it is the province of the judge to determine for what the administrator is chargeable, and if an improper charge is made, or he is held to account for assets not connected with the administration, or reduced into money, the question must be raised by an exception, and can appear in no other manner.—*Ib*..... 117

9. When a judgment is rendered against an administrator, upon a final settlement of an estate, reported insolvent, in favor of several creditors, all of them must be made parties to the writ of error sued out by the administrator, to revise the final decree.—*Ib*..... 117

10. Where an administratrix made a formal division of property of which she is possessed in that character, without any legal warrant therefor, and received nothing as an equivalent, he may successfully defend an action brought for its recovery by one to whom she has assigned a share.—*Dearman* v. *Radcliffe*. 192

11. The entry of record in the Orphans' court, that administration of an estate has been granted, is conclusive to shew that all the pre-requisites of the law have been complied with. In a suit therefore, against an administrator, he will not be permitted to contradict the record of the grant of administration to him, by proving that the bond required by law, was not executed until afterwards, and that the official oath was not then administered—*Eslava* v. *Elliott, adm'x*. 264

12. When an executor, administrator or guardian, wishes his account settled, he must first present it to the judge of the Orphans' court, with his vouchers; it must then be examined, or audited, and stated for allowance: forty days notice of the term, at which it will be reported for allowance, must then be given, that all persons interested may examine the account thus stated, and be prepared to contest it.—*Robinson and Wife, et als.* v. *Steele, adm'r, &c*.....473

13. Those pre-requisites, to a settlement of such accounts, must appear, by the record, to have been complied with....*Ib*..... 473

14. The general rule which requires a plaintiff in an action *ex contractu* against several, to show the liability of all the defendants, to entitle him to a judgment against a less number, does not apply where the defendants are sued as executors or administrators, upon a contract made with their testator or intestate; in such case, the plaintiff is entitled to a judgment against such of the defendants as may be shown to sustain the character in relation to the estate of the deceased, in which they are charged.—*Gray's adm'rs* v. *E. J. & H. White*.....490

15. A *scire facias* against the heir, to subject lands descended to him, to the payment of a judgment obtained against the ancestor, must be sued out in conformity with the statute of this State, and therefore the executor or administrator must be a party.—*Fitzpatrick, et als.* v. *B. W. Edgar* 499

16. A written acknowledgment by an acting executor, that a claim was presented within the time required by law, is evidence of the fact of presentment; and the subsequent resignation of the executor, will not impair its value as evidence,

and make it necessary to call the executor as a witness.—*Starke & Moore* v. *Keenan's ex'rs*..... 590

17. It is not necessary that a foreign executor or administrator suing in our courts, should negative by his declaration, that the deceased had a known place of residence in this State, at the time of his death, or that his estate within the same had been committed to a domestic representative. *It seems*, that if the executor or administrator appointed abroad, is not authorised to maintain an action here, the ground of disability should be pleaded in abatement.—*Cloud* v. *Golightly's adm'r*..... 654

18. The court in which the foreign executor or administrator sues, may of its own motion require the production of the letters testamentary, &c.; and should, where its production is insisted on by the defendant, require it before judgment. But the omission of the record to show whether such a requisition had been made or insisted on, is not an error affecting the regularity of the proceedings. *Ib*..... 654

See *Trust and Trustee*, 10, 11, 12.

FORTHCOMING BOND.

1. The damages of six per cent. authorised to be imposed when an injunction is obtained for delay, cannot be allowed by the chancellor, unless the facts stated in the bill are shown to be untrue, or evasive, and cannot therefore be allowed when the bill is dismissed for the want of equity.—*Crawford* v. *The Bank of Mobile*..... 55

2. The giving of a forthcoming bond is not a waiver of any irregularity in the execution.—*Van Cleave* v. *Haworth*.....188

3. The lien of an execution creditor upon the personal estate of his debtor, when it has once attached, by the execution coming into the hands of the proper officer, is not divested, as between the debtor and his personal representatives and the creditor, by the taking and forfeiture of a forthcoming bond; but the execution issued thereon against the principal and surety, continues the lien of the first execution, although it is issued after the death of the principal obligor. *Caperton* v. *Martin*. 217

4. The forthcoming bond described a *fieri facias* as having issued against the goods, &c. of J L, requiring to be made for debt, damages, and costs $2743; the *fi. fa.* issued against the goods, &c. of J L, W H C, L J M, and A J S, requiring to be the sum of $2492 50-100: *Held*, that the bond did not conform to the execution, and that the same should be quashed.—*Lunsford, et al.* v. *Richardson & O'Neal*..... 618

See *Lien*, 6.

FRAUD.

1. A purchase by an administrator of one of the distributees, shortly after he came of age, of all his interest in his father's estate, the administrator having rendered no inventory of the estate, or stated an account, and the purchase being made at a grossly inadequate price, considered fraudulent and voidable at the election of the distributee, if application had been made for that purpose within a reasonable time afterwards, or within a reasonable time after obtaining knowledge of the fraud.—*Johnson* v *Johnson*..... 90

2. After the lapse of eleven years from the making of such a contract, a court of equity will not lend its aid to rescind it, and compel the administrator to account: the distributee having, when the contract was made, or soon afterwards, knowledge of circumstances sufficient to put him on enquiry, and six years afterwards being affected with the notice of the fraud.....*Ib.* 91
3. Notwithstanding a fraud may have been committed, the bar, from lapse of time will be effectual, unless a suit is prosecuted within a reasonable time after the discovery of the fraud; and it is not true, at least in equity, that time does not commence running until after the discovery of the fraud...*Ib.*.....91
4. An allegation in a bill, that the complainant was not advised, until long after the settlement was made, that a fraud had been practiced on him, is too vague and uncertain. The time when he acquired such knowledge should have been stated.—*Ib.*.....91
5. Although a transfer of property made to delay, &c. creditors, is void as against the latter, it is valid as to the grantor, his heirs and distributees; and they can not recover it of the representatives of the grantee....*Dearman* v. *Radcliffe.* 192
6. When the plaintiff, in an action of detinue, makes title to the chattel sued for under a bill of sale, from a former owner, it is not competent for the defendant to show fraud in acquiring this title, if he has no connexion with it....*Dunklin* v. *Wilkins, et al.* 199
7. It is otherwise, if he shows he is the agent of the former owner, and detains the chattel by his direction.—*Ib.*.....199
8. A deed of trust, conveying land, slaves, mules, plantation tools, &c., also *corn, fodder and bacon*, giving to the trustee the management of the plantation during the current year, and devoting the proceeds thereof to the payment of the debts to secure which the deed was made, is not fraudulent *per se*....*Ravisies* v. *Alstan, trustee*.....297
9. The possession of the grantor, when consistent with the deed, is not a badge of fraud: after default, and when the property is liable to sale, such an inference will arise, but will be open to explanation....*Ib.*.....297
10. After a sale of the trust property, and purchase thereof, *bona fide* by the *cestuis que trust*, it is not a badge of fraud that they permit the grantors, who were their parents, to remain on the land....*Ib.* 297
11. Where a creditor receives of his debtor, a note which a third person gave to the latter on the purchase of goods, if the creditor was cognizant of the consideration of the note, when he became its proprietor, or retained it as his own, after he acquired such knowledge; in neither case, will he be allowed to show that the sale of the goods was fraudulent, with the view of subjecting them to the payment of his debt....*Butler & Alford* v. *O'Brien, surv. partner*..... 316
12. A conveyance by a father-in-law to a son-in-law, of one-half a lot for the consideration, as expressed in the deed, of twenty-nine hundred and twenty-five dollars, but the true consideration, the note of a third person, then past due, which was transferred by delivery merely, and has never been collected, the deed being made two days before the execution of a deed of assignment of the property of the father-in-law to the son-in-law, as trustee, and with a knowledge of his insolvency--held, fraudulent and void as to creditors. —*Cummings & Cooper* v. *McCullough, administratrix*..... 324
13. Where a deed conveyed to a trustee, all the real and personal property, *choses in action*, &c. of the grantor, in general terms, and without any description or schedule, except three slaves described by name, for the payment of creditors,

to some of whom a preference is given, but only one specified by name, and no list of their names or of the amounts due them, nor any provision for the creditors to become parties to the deed, or notice to be given them, and no notice in fact given...held, that although neither of these facts singly, or even all taken together, might be conclusive evidence of fraud, that they raise the presumption of fraud, subject to explanation by the other facts attending the transaction.... *Ib.* 324

14. The retaining possession by the grantor, of a portion of the trust property for more than than three years, is a badge of fraud, which is not explained by an alleged contract of hiring, set up in the answer, the terms and conditions of which are not given, and nothing appearing to have been received; nor is it a sufficient excuse for failing to sell the property, that it was reserved from sale that it might appreciate in value, a portion of the property, being slaves of from near forty to seventy years of age....*Ib.*..... 324

15. Where a sale of personal property is absolute, and possession remains with the vendor, and there is no proof of circumstances to explain why possession did not accompany and follow the sale, the vendor being insolvent, in legal contemplation, the evidence of fraud is conclusive...*Planters' and Merchants' Bank of Mobile* v. *Borland*..... 531

16. The concealment, or non-disclosure of facts, to amount to a fraud, must be of those facts and circumstances, which one party is under some legal or moral obligation to communicate to the other; and which the latter has a right, not merely *in foro conscientiæ*, but *juris et de jure* to know....*Van Arsdale & Co.* v. *Howard*..... 596

17. An omission to communicate, or a concealment of facts, in such cases, should be attended by some evidence of trust or confidence, reposed by one party in the other, to constitute a fraud.—*Ib.*.....596

See *Deed and Registration of*, 9.

FRAUDS—STATUTE OF.

1. The statute of frauds declares that every gift, conveyance, &c. of lands, &c. to delay, hinder, &c., creditors, or to defraud purchasers, shall be "utterly void;" and a subsequent *bona fide* purchaser may impeach such conveyance, and show its invalidity, as well at law, as in equity....*Carter* v. *Castleberry*..... 277

GAMING.

1. The loser of notes at gaming, may file his bill in equity to restrain their transfer, and the prosecution of suits upon them; and this, whether the loser indorsed them or passed them by *delivery merely*, or whether they remain in the hands of the winner, or have been transferred to a third person, *with notice* of the circumstances under which the winner acquired them....*Barker, et al.* v. *Callihan*. 708

GARNISHEE.

1. When the stockholder of a corporation is garnisheed as a debtor of the company and answers that he has paid all the calls made by the President and Directors of the company upon him, he cannot be made responsible upon the residue of his stock, upon which no calls have been made, upon the general law of garnishment—*Bingham v. Rushing*..... 403

2. A garnishee who answers that he is indebted to the defendant in execution, cannot be discharged on the ground that he has a claim, as administrator of

another person, for a larger amount. Such a claim is in the nature of a set-off, and, not being due in the same right, cannot be allowed as such.—*Legal Representatives of Thomas, deceased*, v. *Hopper, garnishee, &c.* 442

3. A summons of garnishment is not in the nature of an equitable proceeding, but a *legal* remedy, and to be so treated...*Ib*..... 442

4. A garnishee cannot plead in bar of a recovery, in a suit brought against him by the assignee of a promissory note, that judgment *nisi* has been rendered against him as the debtor of the payee, and that he has paid the same—there not appearing to have been any *sci. fa.* issued, or served on him, nor any final judgment against him.—*Johns and Cole* v. *Field*..... 484

5. When a garnishee discharges a judgment rendered against him, if the creditor should afterwards attempt to enforce the collection of the original debt by execution, the court out of which it issued, would on motion, direct satisfaction of the judgment, so far as it was discharged by the payment of the judgment rendered against the garnishee; and therefore, a bill in chancery would not lie for that purpose, unless other facts were alleged, which would give the court of chancery jurisdiction.—*Chandler* v. *Faulkner and Faulkner*..... 567

6. *Semble;* Where a plaintiff in attachment moves for judgment upon the written answer filed by a garnishee, it will be inferred that he accepted the answer, and waived an examination in open court.—*Leigh* v. *Smith*..... 583

7. Although a garnishee is required to appear, within the first four days of the term to which the garnishment is returnable, and answer on oath, &c.; yet no judgment can be rendered against him upon the answer, before the plaintiff has recovered a judgment against the defendant in attachment...*Ib*.....583

8. Where a garnishee has appeared and admitted in writing, that he is indebted to the defendant in attachment, it is more regular to render a judgment against the defendant and garnishee at the same term; but if it has been entered against the defendant only, it is competent for the court, at a subsequent term to render judgment against the garnishee; and this, although he has not been notified since the cause was disposed of as to the defendant, that a judgment would be moved for against him...*Ib*.....583

9. E G, a garnishee answered, that S G was indebted to A S, in the sum of $5,000, and to secure its payment, conveyed to him a house and lot by way of mortgage; afterwards the same property was sold under a *fieri facias* against the estate of S G, and A S became the purchaser; subsequently, A S sold it at public auction, and E G bid it off at $10,005—having first agreed with A S, that upon the payment to A S, of the sum of $6,000, the amonnt due him on the mortgage and the sum advanced on the purchase under execution, the latter should relinquish to him the residue of the sum at which the property was bid off, remarking that he, E G, and S G might do as he pleased with it: *Held*, that the answer of the garnishee did not show such an indebtedness to S G as authorized the court to render a judgment against him; that if S G had an interest in the property, either as mortgagee or by contract with Saltmash, he could not relinquish it without consideration to E G, so as to defeat his creditors, but himself or his creditors must assert that right in equity.—*Perine and Crocheron* v. *George*..... 641

10. B was summoned as a garnishee alleged to be the debtor of H, against whom R had recovered a judgment; B answered that he was indebted to H in the sum of eight hundred dollars, from one to two hundred of which was dischargeable in saddlery: *Held*, that the plaintiff was not entitled to an *unconditional* judgment against the garnishee for eight hundred dollars. *Quere:* could the court have delayed proceedings to afford the garnishee an opportunity to deliver the saddlery according to his contract: or could the entire debt have been condemned with the reservation of B's right to deliver the saddlery to the sheriff, and *pro tanto* discharge the judgment.—*Blair* v. *Rhodes*.....648

11. An affidavit made for the purpose of obtaining a garnishment consequent upon a judgment, will not be regarded on error as conclusive that there was a judgment, against the creditor of the garnishee; the existence of such judgment must be shown by the record of the suit against the original parties; or by its recital in the judgment rendered against the garnishee...*Ib*..... 648

See *Practice at Law*, 19.

GIFT.

1. A having a judgment against J for twenty-seven hundred dollars, obtained in an action of slander, agreed with J that if he would pay him seven hundred dollars to defray his expenses and pay the costs, and one would convey to one J L property sufficient to discharge the residue of the judgment in trust for the separate use of the wife and children of J, and J accordingly made the conveyance: *Held*, that if the transaction was *bona fide*—if the judgment was not collusive, and the conveyance, to the use of the wife and children of J, was not intended to secure to J, through the apparent ownership of his wife and children, the enjoyment of the property, that it was valid as a gift from A. That such an instrument, as it was for a valuable consideration, and absolute in its terms, was not required to be recorded either by the act of 1803, or by that of 1828; and that the consent of A to the conveyance could be established by proof, *dehors* the deed.—*Lazarus* v. *Lewis*.....457

GUARANTY.

1. The indorsee of a promissory note sued the guarantor thereof, upon a guaranty made simultaneously therewith, by a person not a party to the note, in the following words: "For value received, I guarantee the payment of the within note, after legal course and process against the maker: S. Farley." *Held*, that the action was maintainable.—*Neal* v. *Smith*.....568

GUARDIAN AND WARD.

1. An infant is not personally liable, even for necessaries, when they are supplied to her by a store keeper with the permission of her guardian, and charged to him, although the credit given to the guardian may have been induced by the fact that the ward had an estate of her own, and with the expectation that the debt would be paid out of it. The contract is personal to the guardian, and his liability cannot be shifted to the infant.—*Simms* v. *Norris & Co.* 42

2. Contracts made between trustee and *cestui que trust*, or between guardian and ward, soon after the latter comes of age, or one standing in the relation of guar-

dian, are viewed with so much jealousy by courts of chancery, that they are voidable by the latter, if within a reasonable time he seeks to avoid the contract. Such a contract can be supported only where the trustee or guardian, previous to the contract has made such a full and fair disclosure of all the facts or circumstances which have come to his knowledge as such, as to enable the other party to deal with him on equal terms—whether mere inadequacy would not be sufficient to set aside such a contract—*Quere.—Johnson* v. *Johnson.* 90

3. The guardian of an idiot may sue at law, not only for the recovery of a debt, but in any case in which the guardians of infants may maintain a suit.... *Dearman* v. *Dearman, guardian*.....202

4. Where a guardian brings an action of trover, alleging that his ward, an infant, was possessed of the property, and lost the same, the declaration should be at the suit of the ward, by his guardian, instead of making the latter the real plaintiff....*Ib*.....202

See *Orphans' Court*, 5.

See *Practice in Chancery*, 11.

HEIR AND DISTRIBUTEE.

1. A *scire facias* against the heir, to subject lands descended to him, to the payment of a judgment obtained against the ancestor, must be sued out in conformity with the statute of this State. and therefore the executor or administrator must be a party.—*Fitzpatrick, et als.* v. *B. & W. Edgar*..... 499

HUSBAND AND WIFE.

1. "A covenant in a bond for title to land, that H W B, and M B, his wife, shall well and truly convey, and make a fee simple title to the land to the said M," upon the payment of the purchase money—only bound the wife to relinquish her dower, and did not bind her individually to make title to the lands; nor was the surety to the bond bound for her acts, further than she was bound herself....*King and Barnes, adm'rs* v. *Moseley*.....610

See *Contingent Remainder*, 1.

IDIOTS AND LUNATICS.

1. The guardian of an idiot may sue at law, not only for the recovery of a debt, but in any case in which the guardians of infants may maintain a suit.— *Dearman* v. *Dearman, guardian, &c*.....202

2. It is competent for the chancellor to determine the question of lunacy, when raised upon the pleadings, without directing an issue for the purpose of informing his conscience in the matter.—*Alexander, by his guardian* v *Alexander*. 517

3. The guardian of a lunatic, who has a just pretence for suing, and has conducted himself fairly, is not chargeable with costs, although unsuccessful in the suit; and where he is charged with them, an appellate court will correct the decree on writ of error, if some other substantial ground of appeal be joined, and charge the estate of the lunatic with the entire costs....*Ib*. 517

INFANTS.

1. An infant is not personally liable, even for necessaries, when they are supplied to her by a store-keeper with the permission of her guardian, and charged to him,

although the credit given to the guardian may have been induced by the fact that the ward had an estate of her own, and with the expectation that the debt would be paid out of it The contract is personal to the guardian, and his liability cannot be shifted to the infant.—*Simms* v. *Norris & Co.* 42

2. When infants who are defendants to a suit in chancery, reside out of the State, it is essential that the proceedings against them should conform to the statute providing the manner by which absent defendants shall be brought before the court; and the record must also show that their rights as infants have been scrutinized, and if necessary, protected.—*Erwin, adm. et al* v *Ferguson, et al.* 158

See *Construction*, 3.

INSANITY.

1. When the county judge impannels a jury to try the question of sanity, where a will is offered for probate, he has the power to set aside the verdict and to grant a new trial, if, in his opinion, the verdict ought not to be permitted to stand....*McElroy* v. *McElroy*..... 81
2. There is no middle ground between capacity and incapacity, to make either a contract or a will, and both, when assailed on the ground of insanity, stand on the same footing.—*Ib*..... 81
3. The mode of proving insanity is by showing a series of actions or declarations which evince an aberration of mind; and it is not, in general, proper to take the opinion of witnesses derived from knowing or hearing the facts deposed to. Whether there may not be exceptions to the general rule, arising out of some peculiar relation or connexion of the witness (whose opinion is offered) to the supposed lunatic—*Quere.*—*The State* v. *Brinyea*.....241
4. If a person, after verdict, and before sentence, becomes insane, it is good cause for staying the sentence, but where the question of insanity has been passed on by the jury, a motion to the court to stay the sentence cannot be entertained. *Ib*.....241
5. When the prisoner's guilt is clearly made out, if he relies on insanity as a defence, he must make it out to the satisfaction of the jury beyond a reasonable doubt, which is the rule laid down in the State v. Marler, [2 Ala. 43]—*Ib.* 242

INSOLVENT DEBTOR.

1. An affidavit to hold to bail, which affirms that the defendant "has fraudulently conveyed, or is about fraudulently conveying his estate or effects," is defective under the act of 1839 "to abolish imprisonment for debt," because it is in the alternative, instead of alleging one distinct ground.—*Wade* v. *Judge.* 130
2. The statutes of 1807, '11, '21, '33 and '39, in respect to insolvent debtors, are parts of an entire system, and to be considered *in pari materia:* these several acts regard the schedule of the debtor rendered after arrest, when accepted by a court or judicial officer, as a transfer in law of the effects to which it refers, to the sheriff of the county in which they are found. But if the creditor fail to obtain judgment, or the debtor is otherwise legally discharged, the legal assignment is avoided and the property re-vests in the debtor.—*Ib*.....130
3. *Quere*—does the acceptance of a schedule operate a transfer of the real and personal estate of the debtor, which may be *extra territorium.*—*Ib.* 130
4. Previous to discharging from imprisonment an insolvent debtor who has rendered a schedule of his effects, the court may direct that money, choses in action, or other property about his person or near at hand, shall be delivered up...*Ib.* 130

5. In a proceeding by *habeas corpus*, at the suit of one who has been arrested on civil process, with the view of obtaining his discharge, the State and not the plaintiff in the action, should be made the adverse party. An order made in such a proceeding is not a final judgment or sentence, which may be reviewed on error; but it seems, the party aggrieved by it, may obtain justice by a *mandamus*, or other appropriate writ.---*Ib.* 130

See *Lien*, 7.

See *Criminal Cases, and proceedings in*, 6.

INTEREST.

1. When a judgment is affirmed on writ of error, it is error to compute the interest then due on the judgment, and render judgment for the aggregate amount in the appellate court; as that would be compounding the interest.---*Richards, and others* v. *Griffin* 196

INTERROGATORIES.

1. Interrogatories propounded to a party under the act of 1837, "More effectually to provide for discoveries in suits at common law," should either in themselves, or by the affidavit of the party exhibiting them, affirm the existence of the facts sought to be elicited, and that they are within the knowledge of the party called on to answer. Although the party thus examined undertake to answer without objection, an exception to his answers for insufficiency, will not be sustained, where the defects of the interrogatories are such, that it does not appear that his answers will be material.—*Branch Bank at Montgomery* v. *Parker* 731

JUDGMENT AND DECREE.

1. Where the defendant in execution, after the same has been levied on personal property of sufficient value to satisfy it, assents to the assignment of the judgment to a third person, it may be inferred that all further proceedings under the levy was suspended, and that the property was returned to the defendant's possession, if it had been removed; in fact it may be questioned whether the defendant's assent would not estop him from insisting upon the discharge of the judgment by any thing done by the sheriff previous to its assignment, and impose on him the necessity of re-possessing himself of the property levied on.... *Haden, et al.* v. *Walker* 86
2. When a judgment has been assigned, the assignee may sue an execution thereon in the name of the plaintiff, and independently of his control.---*Ib.* 86
3. When a judgment is rendered against sureties in a summary manner, as was formerly the case in this state, upon forthcoming bonds; or as was here irregularly rendered against the sureties on the administration bond, such a judgment is distinct and separate from, and cannot be connected with the previous judgment, by suing out a writ of error. When a writ of error is sued out in the names of the sureties, it only removes the judgment rendered against them... *Clarke* v. *West, et al.* 117
4. When a judgment is rendered against an administrator, upon a final settlement of an estate, reported insolvent, in favor of several creditors, all of them must be made parties to the writ of error sued out by the administrator, to revise the final decree.---*Ib.* 117

5. A judgment rendered for a larger sum than is found due by the jury, on a special verdict, cannot be supported.—*Reid, et al.* v. *Dunklin.* 205
6. Where a judgment was rendered in favor of "The President of the Bank, &c." omitting the words "and Directors," which were part of the corporate name; the omission is a mere clerical misprision, amendable at the costs of the plaintiff in error.—*Snelgrove* v. *The Branch Bank at Mobile.* 295
7. It is permissible for a plaintiff to waive every thing to which the verdict of a jury has ascertained he was entitled, and have a judgment rendered for costs alone. *Phelan* v *Fancher*.....449
8. Where the judgment is rendered in favor of the "plaintiff," where there are more than one, it will be intended to be a mere clerical error.—*Ib* 449

See *Criminal Cases and Proceedings in*, 3, 4.
See *Appeal and Certiorari*, 1.
See *Interest*, 1.

JUSTICES OF THE PEACE.

1. The jurisdiction of justices of the peace, is limited to cases in which the amount in controversy does not exceed fifty dollars; and where a judgment rendered by a justice is appealed from, the recovery in the appellate court, should not exceed the sum of fifty dollars, with interest from the time the primary judgment was rendered. But where the judgment on appeal is consequent upon *a verdict*, it will not be reversed on error, because it is rendered for a sum greater than that which limits the jurisdiction of justices, with interest from the time stated.—*Pruitt, et al.* v. *Stuart*.....112
2. When a sum exceeding twenty dollars is claimed by the plaintiff, in a proceeding before a justice of the peace, the defendant cannot be permitted to prove a credit of twenty dollars, or under, by his oath.—*Ivey* v. *Pearce, use, &c.* 374

LANDLORD AND TENANT.

1. The act of 17th January, 1834, authorising a distress for rent in the city of Mobile, does not justify the rendition of a general judgment against the tenant, but merely a condemnation of the goods distrained. The proceeding is authorized only against the tenant, and will not lie against his administrator.—*Dumes, adm'r* v. *McLosky*.....239
2. The possession of a tenant becomes adverse to his landlord, when he disclaims to hold under him, and the statute of limitations begins to run against the landlord, from the time he has notice of the disclaimer.—*Tillotson* v. *Doe, ex dem. Kennedy*.....407
3. Where an action is brought by a purchaser at a sheriff's sale, under a *fieri facias*, against the defendant in execution; the admission of the landlord of the latter, to defend with him, *it would seem* could not prejudice the plaintiff, as the landlord would not be permitted to set up a title consistent with the tenant's possession, to defeat a recovery.—*Doe, ex dem. Davis* v. *McKinney & McKinney*.....719
4 *Semble;* an order permitting the son to defend an ejectment, brought against the father, for the recovery of the possession of lands, to which the former claims title, is unobjectionable.—*Ib*.....719

LEGACY AND DISTIBUTIVE SHARE.

1. A legatee whose legacy has never been assented to, cannot set-off the provision made for him by the will, against an action brought by the executors for the recovery of money due to the testator.—*Sorrelle's ex'rs* v. *Sorrelle*..... 245
2. Where a creditor bequeaths a legacy to his debtor without noticing the debt, and after the testator's death, the securities for the debt are found uncancelled among his papers, the legacy is not considered even *prima facie* a release or extinguishment of the debt.—*Ib.*..... 245

LIEN.

1. Where different creditors claim a priority of lien for their respective executions, and one of them moves against the sheriff and his sureties, so as to coerce an appropriation of the money to the satisfaction of his *fi. fa.* although the other creditor may have the prior lien, yet the party submitting the motion is entitled to a judgment for the excess of money in the sheriff's hands. But, if the plaintiff in such case, have returned the facts specially to the court, and asked its direction thereupon, he will be relieved from the payment of damages and interest. *Wood* v. *Gary, et al*..... 43
2. A writ of *fieri facias* being returnable to the first Monday in April, the direction of the plaintiff to the sheriff on the 25th March preceding, to return it, will not render it *dormant*, or impair its *lien*, as it respects an execution of a junior judgment creditor subsequently issued, unless such return was made when the execution might have been satisfied and with interest to favor the defendant in execution—*Ib.*..... 43
3. An *alias* issued upon the judgment in such a case, will continue the *lien* of the first execution, if there has not been a lapse of an entire term intervening, and overreach an execution issued on a junior judgment before such *alias*, if the *alias* comes to the sheriff's hands before a sale of property under the junior execution...*Ib.*..... 44
4. When personal property of the defendant in execution is brought into the county after executions of different judgment creditors have come to the sheriff's hands against such defendant, the eldest judgment creditor who has preserved his *lien* will have the prior right...*Ib.*..... 44
5. The master of a vessel has the right to retain the possession of goods liable to the payment of a general average, until it is paid, and if he parts with goods which he is thus authorised to retain, and afterwards pays their portion of the contribution, an implied assumpsit is raised that he shall be repaid by the owner. *Eckford* v. *Wood, et al.*..... 136
6. The lien of an execution creditor upon the personal estate of his debtor, when it has once attached, by the execution coming into the hands of the proper officer, is not divested, as between the debtor and his personal representatives and the creditor, by the taking and forfeiture of a forthcoming bond; but the execution issued thereon against the principal and surety, continues the lien of the first execution, although it is issued after the death of the principal obligor. *Caperton* v. *Martin*..... 217
7. A coroner is not bound to notice the insolvency of a debtor's estate against

which he has an execution; nor does the death of a debtor, whose estate is reported insolvent, destroy the lien of an execution when it has once attached upon his property... *Ib.* 217

8. An absolute bill of sale was made of a slave, who was hired out for twelve months, more than half of which time was unexpired; the vendor retained possession for a year, or perhaps more, after the time of hiring—the vendee, repeatedly admitting that the greater part of the purchase money was unpaid, and that the vendor was entitled to the slave until it was paid: *Held*, that whatever might be the legal effect of the bill of sale upon the rights of the parties, the facts warranted the inference, that the vendor's possession was under a contract creating a pledge or lien.—*Vaughn* v. *Wood*. 304
9. The admission in a bill of sale, that the purchase money was paid, is not conclusive against the vendor, and will not be allowed to defeat a promise subsequently made for its payment, so as to invalidate a lien given to him.—*Ib.* 304.
10. The equitable lien of the vendor of land, cannot be enforced against the vendee, at the suit of an assignee of the note given for the purchase money, where the note was assigned by the vendor without recourse.—*Hall's ex'rs* v. *Click, et al*..... 363

LIMITATIONS AND NON-CLAIM, STATUTE OF.

1. The statute of limitations is as available in equity, as at law, in all cases where the courts have concurrent jurisdiction; but the mere staleness of a demand will prevent a court of equity from granting relief when no statute of limitations governs the case.—*Johnson* v. *Johnson*..... 90
2. After the lapse of eleven years from the making of such a contract, a court of equity will not lend its aid to rescind it, and compel the administrator to account: the distributee having, when the contract was made, or soon afterwards, knowledge of circumstances sufficient to put him on enquiry, and six years afterwards being affected with the notice of the fraud.....*Ib.* 91
3. Notwithstanding a fraud may have been committed, the bar, from lapse of time will be effectual, unless a suit is prosecuted within a reasonable time after the discovery of the fraud; and it is not true, at least in equity, that time does not commence running until after the discovery of the fraud...*Ib.*.....91
4. When lapse of time is relied on by the defendant, if the complainant wishes to avail himself of any of the exceptions to the rule, he must put such matter in issue, either by amending his bill, or by a special replication.—*Ib.*..... 91
5. An allegation in a bill, that the complainant was not advised, until long after the settlement was made, that a fraud had been practiced on him, is too vague and uncertain. The time when he acquired such knowledge should have been stated.—*Ib.*.....91
6. The confirmation by the United States of a concession of lands made by the Spanish authorities, will not prevent one who claims adversely, from availing himself of the statute of limitations, by proof of possession, during the time the government of Spain exercised dominion over the country in which the land is situated; although the statute did not complete a bar until after the concession was confirmed.—*Tillotson*, v. *Doe*, *ex dem. Kennedy*.....407
7. The plaintiff and defendant were mutually indebted to each other upon ac-

counts. The account of the former was stated at $1594 20-100, of the latter at $1102 50-100. Both of the accounts were barred by the statute of limitations; on the plaintiff's the defendant made the following indorsement, which was subscribed by him, viz: "I admit the correctness of the within account with the exception of the item for $520 paid W. D. Bynum, upon an order purporting to be drawn by me, which I do not admit, March 31st 1838." The plaintiff made an admission on the defendant's account as follows: "The above account is correct, and I agree to allow it against my account on settlement." *Held*, that the indorsement by the defendant was not a conditional admission that the excepted item was a proper charge, and a waiver of the statute of limitations, upon the plaintiff's making proof of its correctness.—*Lucas* v. *Thorington* 504

8. Adverse possession of personal property in this State, for six years, will give a title to the possessor—or, if such possession is had in any other State, a sufficient time to bar an action for the recovery of the property, by the laws of such State. *Brown* v. *Brown* 508

9. The statute of *non-claim*, commences running from the time of the payment of the purchase money of land, if there is any one then in being of whom the vendee can demand title, and the rule would be the same, if the vendee was evicted by title paramount, or the heir asserted a title hostile to that of his ancestor—*King and Barnes, adm'rs*, v. *Mosely* 610

MANDAMUS

1. In a proceeding by *habeas corpus*, at the suit of one who has been arrested on civil processs, with the view of obtaining his discharge, the State and not the plaintiff in the action, should be made the adverse party. An order made in such a proceeding is not a final judgment or sentence, which may be reviewed on error; but it seems the party aggrieved by it, may obtain justice by a *mandamus* or other appropriate writ.—*Wade v. Judge* 130

MASTER AND SLAVE.

1. In the hiring of slaves there is an implied stipulation that the slave is to be employed in some honest pursuit, and if the hirer should incite or compel the slave to steal, or become the receiver of stolen goods, the owner would have the right to rescind the contract, and resume the possession of his slave.... *Rasco & Brantley* v. *Willis* 38

2. In such a case, the hirer would be responsible only for the actual value of the services rendered by the slave, estimated by the contract previously made. *Ib.* 38

3. Evidence that the defendants kept a small grog-shop, about which negroes resorted, with other circumstances conducing to show that an unlawful traffic was carried on by them with slaves, by receiving from them stolen goods, is not proper to go to the jury, to prove that the defendants, and other persons with their permission, incited the slave of the plaintiff to steal, or employed him as an instrument in their unlawful traffic, without further proof, in some way connecting the slave of the plaintiff with these unlawful acts.—*Ib.* 38

MISTAKE OF LAW.

1. A husband having died without reducing into possession the share of his wife,

in her father's estate, the executor of the wife's father, supposing the administrator of the husband to be entitled to it, paid it over to him, by whom it was paid away in the course of his administration, the estate of his intestate being declared insolvent. The executor of the wife's father having brought an action to recover the money from the administrator of the husband, for money paid by mistake, in ignorance of the law: *held*, that he could not recover, as the money had passed from the hands of the administrator, before notice of the mistake, without the possibility of his reclaiming it.---*Yarborough, ex.* v *Wise, adm'r.* 292

MORTGAGOR AND MORTGAGEE.

1. An allegation that the mortgagor died, leaving certain children surviving him, is equivalent to an allegation that they are his heirs at law.---*Erwin, adm'r et al.* v *Ferguson, et al.* 158
2. When an executrix of a mortgagor, who has refused to qualify as such, is made a party defendant to a bill to foreclose, the objection, if available, is personal to herself, and can only be raised on demurrer.---*Ib.* 158
3. Where the mortgagor of personal property has such an interest therein, as may be sold under an execution for the payment of his debts, the mortgagee can not on the trial of the right of property, upon a claim interposed by him under the statute, introduce proof to show what was the value of the mortgagor's interest, and that it was less than the value of the property in question....*McDonald* v. *Foster & Easton* 664
4. Where a debtor mortgages property to secure indorsers, and stipulates that the mortgagees shall take possession at any time they may think proper, to indemnify them against the consequences of their endorsement, when the mortgagees have taken possession, a mere equity remains in the debtor, which is not subject to a levy and sale under a *fieri facias*.---*Adams* v. *Tanner and Horton.* 740
5. *Semble*; where the mortgagor has such an interest in the property as may be levied on and sold, the most appropriate step for the mortgagee to take, in order to protect his rights, is, to resort to chancery, that the interest of the mortgagor may be ascertained, and separated from that which he asserts... *The Planters' and Merchants' Bank of Mobile* v. *Willis & Co.* 770
6. The retention of the possession of a chattel by the mortgagor, is entirely consistent with the nature of the security. But if the mortgagor retains the possession for an unreasonable length of time after the mortgage is forfeit, this may warrant the inference that the debt was paid, or that the mortgage was held up as a protection for his property against the demands of creditors. Yet in such case, it cannot be assumed as a conclusion of law that the mortgage is fraudulent.---*Ib.* 770
7. The interest of a mortgagor in possession of personal property, may be sold under execution before the mortgage is forfeited; but if the debt intended to be secured, becomes due, and the mortgage provides that in such event, the mortgagee shall be entitled to the immediate possession of the property, or be authorized to sell the same, then he may assert his claim, put an end to the mortgagor's possession, and if the transaction is *bona fide*, the debt really due, and lien of the mortgage continuing, the property cannot be condemned to satisfy the execution... *Ib.* 771

8. Where the payees of a note, secured by mortgage, have undertaken to transfer the same, and received part of the consideration agreed to be paid therefor; if they, as mortgagees, have a legal right to the possession, they may interpose a claim to the property, (under the statute,) when levied on by execution; and though they receive full payment for their assignment pending the cause the assignees may continue the litigation in the names of the assignors.---*Ib.* 771

NOTICE.

1. A notice by the President and Directors of the Bank of the State of Alabama, with the seal of the corporation, is a sufficient compliance with the charter, which requires the notice to be given by the President of the Bank.---*Crawford, et al.* v. *The State Bank*.....679
2. An accommodation drawer is a surety, and entitled to notice, although he had no funds in the hands of the drawee.---*Sherrod* v. *Rhodes*.....683
3. In such a case the fact that the drawer was indebted to the acceptor, for whose use the bill was drawn, in a sum equal to the amount of the bill, will not dispense with notice of the dishonor of the bill, unless the bill was drawn in payment of the debt---*Ib*.....683
4. If the last indorser of a bill be notified of its dishonor, if he wishes to hold any prior party on the bill liable to him, he must give him notice, unless due notice had previously been given to such prior party by the holder.—*Ib.* 684
5. The want of funds in the hands of the drawee of a bill, furnishes a sufficient excuse for the failure of the holder to present it for acceptance, and give notice with promptness to the drawer, of its dishonor....*Tarver* v. *Nance*..... 712

See *Bills of Exchange and Promissory Notes*, 14.

ORPHANS' COURT.

1. Although a statute allows an execution to be issued against the sureties upon an administration bond, upon the return of "no property" to one issued against the administrator upon a decree of the Orphans' court, yet it is erroneous for that court to render a judgment against such sureties without suit. The execution does not conclude the parties, and they have the right to test the legal sufficiency of the bond, but the manner of so doing is not yet clearly settled.---*Clarke* v. *West, et al*.....117
2. The peculiar jurisdiction of the judge of the county or orphans' court, over the settlement of an insolvent estate, is dependent upon the administrator's report of its insolvency, and cannot be sustained without it. Nor can such a report be inferred or presumed from any recitals made by the court in its orders upon the subject....*Ib*.....117
3. The consequence of a report of insolvency, is to make the administrator of the estate the *actor* in the proceedings: the effect of it is to discharge him from the suits of the creditors who are then entitled to have the assets divided amongst them. The administrator is therefore bound to take notice of all the subsequent proceedings by the court in the settlement of the estate, and no notice to him of the time of settlement is necessary. Creditors are properly notified by publication in some newspaper for forty days, and the place is the court-house where the settlement is made by the judge, and need not be stated in the notice..*Ib.* 117
4. On the final settlement of an insolvent estate, it is the province of the judge to

determine for what the administrator is chargeable, and if an improper charge is made, or he is held to account for assets not connected with the administration, or reduced into money, the question must be raised by an exception, and can appear in no other manner.—*Ib*..... 117

5. A judgment of the county court, refusing to appoint an individual guardian of the estate of certain minors, is not a bar to a suit in chancery, by the minors to recover their legacies.—*Stallsworth, et al.* v. *Stallsworth, ex'or.* 144
6. The title to real estate sold by order of the county court, remains in the heirs of the deceased, until the court decrees a title to be made to the purchaser, and the title is in fact made, notwithstanding the court may have approved the bond given with surety for the purchase money... *Cummings & Cooper* v *McCullough, adm'x*..... 324
7. When an executor, administrator or guardian, wishes his account settled, he must first present it to the judge of the Orphans' court, with his vouchers; it must then be examined, or audited, and stated for allowance: forty days notice of the term, at which it will be reported for allowance, must then be given, that all persons interested may examine the account thus stated, and be prepared to contest it.—*Robinson and Wife, et als.* v. *Steele, adm'r, &c.*..... 473
8. Those pre-requisites, to a settlement of such accounts, must appear, by the record, to have been complied with....*Ib*..... 473

PARTNERS AND PARTNERSHIP.

1. The effects of a *non-resident* partner may be attached, although there is one of the firm resident in the State.—*Conklin* v. *Harris*..... 213
2. Where real estate is purchased by a commercial partnership with the partnership funds, for the purpose of sale, to pay the debts of the firm, it will be considered in equity, as part of the stock in trade, and therefore, as personalty, will go to the surviving partner.—*Heirs, et als. of Pugh* v. *Currie*.....446
3. In such a case it will make no difference that the title is in the deceased partner alone, his heirs will be considered trustees for the survivor.—*Ib*.....446
4. A plea that plaintiff and defendant were partners in the transaction, though a note may have been given by them as principal and security, would be a good defence against an action brought by the latter, against the former, to recover the amount paid by him in the discharge of such note, or evidence of the partnership may be given, under the plea of *non assumpsit.*—*Pollard* v *Stanton.* 451
5. Where an action is brought against several persons as partners, and one of them suffers a judgment by default, the latter is a competent witness for the other defendants to prove that they were not his partners; for a verdict in their favor will not, under the statute, operate a discontinuance of the action as to him. *Scott, surviving partner, &c.* v. *Jones, et al*..... 694
6. An assignment made by one partner *in his name*, of a note payable to the firm, does not transfer the *legal* interest so as to authorise the assignee to sue *at law* in his own name; yet as the authority of the partner will be presumed, a right to the note, and as an incident to it, all securities for its payment, passes to the assignee, who may maintain an action on the note in the name of the payees. *The Planters' and Merchants' Bank of Mobile* v. *Willis & Co*..... 770

PATENT.

1. Although a patent certificate may be evidence of legal title, *quere*, will not a patent issued to a third person by the direction of him who holds the certificate invest the patentee with the paramount legal title.—*Tillotson* v. *Doe, ex dem. Kennedy*..... 407

PLEADINGS.

1. A plea, by an administrator, that before the commencement of plaintiff's suit he had regularly settled the estate with the county court, and judgment had been therein rendered against him in favor of the distributees, is bad; for the administrator cannot settle with distributees until he has paid all creditors who present their demands within the period fixed by law to bar outstanding claims. *Thrash* v. *Sumwalt*..... 13
2. When the issue is formed on a replication to the plea of *plene administravit*, and the verdict is for the plaintiff, it will be concluded that the jury have passed on the quantity of assets and affirmed the allegation of the plaintiff, that more than sufficient assets to pay his demand had come to the administrator's hands, which ought to have been so applied....*Ib*..... 14
3. The statute of non-claim [Dig. 153, § 6] creates a complete bar, by the omission to exhibit the demand to the administrator within eighteen months, in all cases not excepted by the statute, whether the administrator does or does not make publication, as required by another section of the same act; [Dig. 180, § 12] and therefore a replication to a plea of *plene administravit* is bad, when it offers an issue upon the fact of advertising....*Ib*..... 14
4. A count charging the defendant with harboring and concealing a runaway slave, knowing him to be such, is substantially a count in trespass, and may be joined with a count for seizing and carrying away another slave.—*Kennedy* v. *McArthur*..... 151
5. In an action of trespass for harboring a slave per *quod servitium amisit*, it is not necessary to aver in the declaration that the defendant has been criminally prosecuted, as the offence is a misdemeanor only...*Ib*..... 151
6. An averment in a declaration in an action by an assignee against an assignor, that *execution* issued on the judgment from the proper office, and was returned by the sheriff to the *proper office*, endorsed, "there is no goods, &c., of the defendant to be found in my county," is sufficient—*Hammitt* v. *Smith*..... 156
7. The plaintiffs declared against M. & R. *first*, on a promissory note made by the N. O. & M. Mail Line; *second*, on a note signed "N. O. & M. Mail Line by M. & R. agts;" to which there was the plea of *non assumpsit: Held*, that the agency of the defendants being conceded, the notes were obligatory upon the N. O. & M. Mail Line: but the general issue having admitted the legal sufficiency of the declaration, and merely denied the truth of the facts alleged, the defendants could not raise the legal question before the jury, whether the notes were their promises—that point should have been presented by a demurrer to the declaration.—*Minge & Russell v. Curry & Co*..... 168
8. The act of 1818, declaring that every joint promissory note shall be construed to be joint and several in its legal effect, and that any one or more of the pro-

missors may be sued, a plea by one against whom process issued alone, that he was a surety merely, that his principal died after the maturity of the note, and that certain persons (naming them) had administered on his estate within less than six months previous to the commencement of the suit, is not sufficient to abate the action.—*Rice* v. *Brantley*..... 184

9. An assignment in these words, "this note has been transferred to L. M. Guy by J. Weatherby" is sufficient to transfer the legal title to the note to Guy, if made by Weatherby, and being declared on as such, is under the statute of this State, *prima facie* evidence of the fact, unless the assignment is questioned by a sworn plea.—*Deshler* v. *Guy*..... 186

10. Although a note is payable in the city of New York, yet if made and endorsed in this State, in an action against the endorser, the declaration must aver a suit against the maker, and return of no property found as the statute requires. or a sufficient excuse for not bringing such suit—*Howze, Plummer & Co.* v. *Perkins, Hopkins & White*..... 286

11. An allegation that a note was duly and regularly indorsed to the plaintiff, includes within itself an averment, that the paper was indorsed by the payee. *Snelgrove* v. *The Branch Bank at Mobile*..... 295

12. A plea by a sheriff justifying the seizure of property under process of attachment must allege that the writ was returnable, to what court, and that it was in fact returned. But it may, perhaps, be permissible to excuse a return by proper averments—*McAden* v. *Gibson*..... 341

13. Where the replication or rejoinder, &c., contains matter which does not support and fortify it, and which is consequently not pursuant to it, there is a departure in pleading, of which the opposite party may avail himself on demurrer. *Ib.*..... 341

14. The defendant in an action of detinue pleaded the general issue, and several special pleas; to the latter pleas there were replications, rejoinders and sur-rejoinders; the defendant demurred to the sur-rejoinders and his demurrers were sustained; and the plaintiff declining to plead further, the court ordered a non-suit: *Held*, that the non-suit was irregular, and the plaintiff should have been allowed to submit his case to the jury on the general issue. *Ib*..... 341

15. A count which does not allege a trespass directly and positively by the defendant, but charges by way of recital, "that whereas, &c." and also alleges that the plaintiff was discharged from imprisonment, by the judge of the county court on *habeas corpus*, that the prosecution is ended and determined and that the imprisonment was without probable cause, must from its structure, be considered a count in case, for a malicious prosecution, and not a count in trespass. *Studevant* v. *Gains*..... 435

16. When a plea is taken in short, by consent, it must contain *substance—form* only is waived.—*Pollard* v. *Stanton*..... 451

17. A plea that plaintiff and defendant were partners in the transaction, though a note may have been given by them as principal and security, would be a good defence against an action brought by the latter, against the former, to recover the amount paid by him in the discharge of such note, or evidence of the partnership may be given, under the plea of *non-assumpsit*... *Ib*..... 451

18. To a plea that the note on which the action is brought, was not presented to

the administrators of the maker, the plaintiff may reply that the debt was contracted out of the State, without denying that the payee resides within the same. *Gray's adm'rs* v. *E. J. & H. White*..... 490

19. The statute which allows a defendant to plead as many several matters as he may judge necessary to his defence, does not authorise the defendant to rejoin two distinct answers to the replication.... *Ib*..... 490

20. Although no issue of fact appears in the record, if the parties appear, and submit the cause to a jury, the want of an issue will be considered waived.—*The Kemper and Noxubee Navigation and Real Estate Banking Company* v. *Schieffelin & Co*..... 493

21. A plea which denies that the plaintiff who sues as indorsee of a bill, is its legal proprietor, but affirms that it is the property of an association of individuals, of which the plaintiff is one, and that the plaintiff filled up a blank indorsement of the company with his own name, must be verified as required by the statute, which prescribes the manner in which the burthen of proving an assignment shall be thrown upon the plaintiff.... *Tarver v. Nance*..... 712

See *Garnishee*, 4.

See *Covenant*, 1, 2.

See *Sheriff and Sureties*, 15.

See *Executors and Adminstrators*, 17.

PRACTICE IN CHANCERY.

1. The damages of six per cent. authorised to be imposed when an injunction is obtained for delay, cannot be allowed by the chancellor, unless the facts stated in the bill are shown to be untrue, or evasive, and cannot therefore be allowed when the bill is dismissed for the want of equity.—*Crawford* v. *The Bank of Mobile*..... 55

2. When lapse of time is relied on by the defendant, if the complainant wishes to avail himself of any of the exceptions to the rule, he must put such matter in issue, either by amending his bill, or by a special replication.—*Johnson* v. *Johnson*..... 91

3. When a bill is filed to foreclose a mortgage made to two persons, to secure the payment to them, of a sum of money, due by bond, and one of them dies previous to the exhibition of the bill, the survivor is the only indispensable party to the bill, when no interest is disclosed in any other person in the mortgage debt; and it is not proper to join the executors of the deceased obligee as parties complainant.—*Erwin, adm'r, et al.* v. *Ferguson, et al*..... 158

4. But although the executors of the deceased obligee, are improperly joined as complainants in such a bill, the objection, to be available, must be taken by demurrer, and can not be raised for the first time, at the hearing, or on error. *Ib.* 158

5. The heir, or devisee of a mortgagor, who dies the owner of the fee, is an indispensable party to a bill to foreclose; and the personal representative may be made a party, if the complainant chooses to proceed for an account... *Ib.*. 158

6. An allegation that the mortgagor died, leaving certain children surviving him, is equivalent to an allegation that they are his heirs at law... *Ib*..... 158

7. When an executrix of a mortgagor, who has refused to qualify as such, is made

party defendant to a bill to foreclose, the objection, if available, is personal to herself, and can only be raised on demurrer... *Ib*..... 158

8. When infants who are defendants to a suit in chancery, reside out of the State, it is essential that the proceedings against them should conform to the statute providing the manner by which absent defendants shall be brought before the court; and the record must also shew that their rights as infants have been scrutinized, and if necessary, protected.... *Ib*..... 158

9. In proceedings in chancery against absent defendants, it is unnecessary that any subpœna should issue, when the necessary proof of non-residence is made before the register; when infant defendants are non-residents, it is perhaps necessary, under the amended rules, that their ages and places of abode should also appear.... *Ib*..... 158

10. In all suits in chancery against non-resident defendants, it is necessary that the bond required to be given by the statute should be executed, otherwise the decree cannot be sustained, unless they have voluntarily submitted to the jurisdiction... *Ib*..... 158

11. The power exercised by courts of equity, to appoint *guardians ad litem*, for infant defendants, is one to be exercised for their benefit, and therefore the appearance of an absent infant defendant by such a guardian, does not have the effect of a voluntary appearance, so as to obviate the necessity for the statute bond to be given by the complainant... *Ib*..... 158

12. Under our statute providing the manner by which absent defendants shall be brought before a court of equity, publication is required to be made on the court house door, as well as in a newspaper, and if omitted, a decree cannot be sustained.—*Batre, et al.* v. *Auze's heirs*, &c..... 173

13. When a bill is filed by a vendor to enforce his lien for the purchase money, his vendee, who has parted with all his interest in the land to another, is not an indispensable party defendant to the bill; but he may be joined at the election of the complainant, and when a party is concluded by the decree... *Ib*..... 173

14. A complainant having elected to join a party who could have been dispensed with, cannot after, on error, avoid the consequences of a defective service, on the ground that he was not an indispensable party.... *Ib*..... 173

15. When the answer of a defendant shows an outstanding interest in one not made a party to the bill, but the answer is not sustained by proof, there is no necessity to make such person a party... *Ib*..... 173

16. When a suit has been irregularly reversed, no waiver of the irregularity can be presumed against a party who was not before the court, by service or publication. *Quere*—as to those parties who submit to proceed after the irregular revival.. *Ib*..... 173

17. In a bill filed by the vendor of lands, to enforce his lien for the purchase money after the complainant's death, his personal representatives, and not his heirs, are the parties entitled to service; and if both join in reviving the suit, it is an irregularity which can be reached by demurrer, but not in the first instance upon error—*Ib*..... 173

18. In a bill filed against a sub-purchaser to enforce the vendor's lien for the purchase money, due from the first purchaser, after the death of the sub-purchaser,

the suit must be revived against his heirs at law, unless he has parted with his interest by assignment or devise; and if the suit is revived against his personal representative only, it is error...*Ib*..... 173

19. On a bill filed to foreclose a mortgage, it appeared by the bill that there was a prior incumbrancer, who was not made a party; the answer denied the existence of the prior incumbrance, and alleged that it was discharged by payment before the filing of the bill, but demurred to the bill for want of proper parties: *Held*, that as the answer showed that the prior incumbrance was discharged, there was no necessity to make the prior incumbrancer a party, notwithstanding the allegation in the bill, but that a general demurrer to the bill without answer, would have been sustained.—*Gayle v. Toulmin*..... 283
20. What constitutes multifariousness in a bill?—*Chapman* v. *Chunn, et al*...397
21. A party has no right to amend his bill in a material point, after the cause is ripe for a hearing.—*Evans* v. *Bolling*.....551
22. An affidavit of the loss of a bond, so as to let in secondary evidence of its contents, may be made in the body of the bill, or by a separate affidavit. *Ib.* 551
23. A party cannot use his answer to a bill of discovery, as evidence in his favor, unless it is introduced by his adversary, and the same rule applies to answers to interrogatories propounded by one party to the other, under the act of 1837. *The Branch Bank at Montgomery* v. *Parker*..... 731

See *Verdict*, 1.

See *Witness*, 8.

PRACTICE AT LAW.

1. When the issue is formed on a replication to the plea of *plene administravit*, and the verdict is for the plaintiff, it will be concluded that the jury have passed on the quantity of assets and affirmed the allegation of the plaintiff, that more than sufficient assets to pay his demand had come to the administrator's hands, which ought to have been so applied.—*Thrash v. Sumwalt*..... 13
2. When the caption of the record showed that the court was held on the 2d Monday of February, 1841, a memorandum at the head of the judgment entry of "March 17th 1840," will be considered a clerical misprision and amended by other parts of the record.—*Smith, et als.* v. *The Branch Bank at Mobile*.... 26
3. When a debt is contracted in one beat, and afterwards a note is given for it in another, the acceptance of the note does not exempt the maker from being sued in the beat where the debt was contracted.—*Wright and others*, v. *Burt*.....29
4. When a cause is at issue and before the jury for trial, it is erroneous for the court to overrule a plea properly pleaded, but not sustained by the evidence. The proper course is to instruct the jury with respect to the law, and leave them to apply it to the facts which they shall ascertain...*Ib*..... 29
5. A sheriff's deed is conclusive, and cannot be impeached on a collateral issue, except for fraud in its execution, whenever the process under which the land is sold, is supported by an existing operative and unsatisfied judgment.—*Love and Williams* v. *Powell*..... 58
6. The court may in its discretion, permit a defendant to withdraw a plea to the merits, and demur to the declaration or other statement of the cause of action;

and this, although there may have been a mis-trial, or a trial, and a new trial awarded.—*Crawford* v. *Chandler, sheriff*.....61

7. The act of 1819, authorising a proceeding against a sheriff and his sureties, by notice and motion, for the failure to return a writ of *fieri facias;* and the notice sufficiently indicates what judgment will be moved for, when it refers to the act of 1819, as regulating the proceeding...*Ib*..... 61

8. When the county judge impannels a jury to try the question of sanity, where a will is offered for probate, he has the power to set aside the verdict and to grant a new trial, if, in his opinion, the verdict ought not to be permitted to stand....*McElroy* v. *McElroy*..... 81

9. There is no middle ground between capacity and incapacity, to make either a contract or a will, and both, when assailed on the ground of insanity, stand on the same footing.—*Ib*..... 81

10. The endorsement on the writ cannot be looked to, to show that the action was on a lost note.—*Stephenson* v. *Roper*..... 182

11. The dismissing of a suit as to one of the three joint and several obligors, after service of process on all, and before any defence personal to that one is pleaded, is a discontinuance of the whole action—*Keebles* v. *Ford and Vining*..... 183

12. Where the active interest in an execution has been assigned by the plaintiff, his assignee is authorised to use the name of his assignor in a rule against the sheriff and his sureties.—*Brazeal and others*, v. *Smith*..... 207

13. Where a writ is sued out against two joint makers of a promissory note, and served on one only, but the declaration is against both, it is not necessary to enter a discontinuance on the record, as to the party not served with process; if no judgment is rendered against him, this is in legal effect, a discontinuance, and the judgment against the defendant before the court, will be regular.—*Oliver* v. *Hutto, use, &c*..... 211

14. An assignee may maintain an action of debt in his own name, without alleging a promise from the maker.—*Conklin* v. *Harris*..... 213

15. When the service of a writ is acknowledged by the defendant, but the proof of it is omitted to be entered upon record at the time of the judgment, it may be entered *nunc pro tunc*, at a subsequent term, and after writ of error sued out. *Moore* v. *Horn and Bouldin*.....234

16. Upon the affirmance of a judgment where a reversal is saved by an amendment *nunc pro tunc*, pending the writ of error, judgment is notwithstanding rendered against the sureties in the writ of error bond, for damages and costs...*Ib*... 234

17. It is error to render a final judgment by default against a defendant who has interposed the plea of *non est factum.—Crow* v. *The Decatur Bank*..... 249

18. Where an order was made granting a new trial, on terms different from those on which it was asked, and which require their acceptance to be manifested by some act; the prosecution of a writ of error by the party who prayed a second trial, amounts to a non-acceptance of the terms, and is consequently a waiver of the order...*Stephens* v. *Brodnax & Newton*..... 258

19. *Semble;* where the defendant suffers a note to be read to the jury, without objecting to the correctness of its description in the declaration, but excepts to the legal sufficiency of the evidence, an appellate court should not revise the question of variance—*Herndon* v. *Garrison*..... 381

20. Joinder in issue, between plaintiff in execution and garnishee, is a waiver of previous irregularity.—*Betts, garnishee* v. *Brown, use, &c.*.....414
21. Where the record recites that an issue was tried, without disclosing what the issue was, the legal intendment is, that it was a mere denial of the allegations of the plaintiff.—*Johnson, et al*, v. *J. & B. F. Petty*..... 528
22. The court may, after judgment for the plaintiff, permit a declaration to be substituted in lieu of the original, when it has been lost or mislaid; and though it is proper to require notice to be given to the defendant, that a motion will be made for that purpose, yet if the court grant the motion, without a previous notice, its action will not be considered as void or irregular.—*Wilkerson and another* v. *Branham*..... 608
23. A judgment by default, where no declaration has been filed, is irregular and cannot be supported.—*Wellborn* v. *Sheppard*..... 674
24. Several defendants, who have each paid for himself different amounts upon an execution against them, which is afterwards quashed, cannot unite in a suit to recover the amount paid, and obtain one judgment adjudging to each of them the sums they are respectively entitled to. Their rights are several, each are not interested in the entire judgment, and difficulties might arise in its enforcement by execution—*Riley* v. *Marshall et al*..... 682
25. The right to continue a cause, the sufficiency of the showing for that purpose, and the amendment of the pleadings, are submitted to the discretion of the primary court, to be exercised with a view to the promotion of justice; and its decision in such case is irreversible on error. . *The Planters' and Merchants' Bank of Mobile* v. *Willis & Co*..... 770

See *Bank* 3 *and* 4.
See *Bond*, 1, 2.
See *Pleading*, 14.
See *Garnishee*, 8, 9.
See *Appeals and Certiorari*, 3.

POWER.

1. To sustain the exercise of a naked power, not coupled with an interest, the law requires that every pre-requisite to the exercise of that power should precede it. *Pope and Hamner* v. *Headen*..... 433

PRINCIPAL AND AGENT.

1. The circumstance that an agent, acting in the business of his principal, takes notes payable to himself, in discharge of the sum due to his principal, is not, by itself, such evidence of a conversion as will dispense with proof of a demand of the money collected on the note before suit brought...*Kidd* v. *King*.....84

PROCESS, SERVICE OF.

1. Where process issues against A S, and A L, setting out their names at length and is returned executed on S, merely stating his sir name, it will be intended that he is the person of that name designated in the process.—*Snelgrove* v. *The Branch Bank at Mobile*..... 295
2. Where process issued to the sheriff of a particular county, and is returned exe-

cuted by S B, as sheriff, generally, the court will recognize him as the person of that name who is sheriff of the county...*Ib.* 295

RECORD.

1. When an entry of record in the county court does not show the time when it was made, and the *date* is afterwards ascertained by a judgment *nunc pro tunc*, it is not admissible to contradict this date, by proving the dates of the entries on the same record, immediately preceding and succeeding it.—*Eslava* v. *Elliott, adm'x* 264

RELEASE.

1. A witness, who has an interest in the event of the suit, may be rendered competent by release, from the person to whom he may be liable—and a delivery by the releasor to the releasee, personally, is not necessary—it may be filed in court.—*Brown v. Brown*..... 508

RIGHT OF PROPERTY, TRIAL OF.

1. A *fieri facias* was issued against the property of H Y, C B M and others, and levied on certain slaves as the property of the former; to which D Y interposed a claim and gave bond to try the right, pursuant to the statute. On the trial, the plaintiff in execution offered as a witness, C B M, to prove that the slaves in question were the property of H Y: *Held*, that he was interested in subjecting them to the satisfaction of the execution, and therefore an incompetent witness. *Yarborough's ex'r* v. *Scott's ex'r*..... 221
2. A bond given by the claimant of property levied on by attachment, payable to the sheriff, instead of the plaintiff, and the condition of which is not as extensive as the statute requires, is good as a common law bond; a surety in such bond is consequently an incompetent witness for the claimant.—*Butler and Alford* v. *O'Brien, surviving partner*..... 316
3. On the trial of the right of property, levied on by attachment, to which a claim has been interposed under the statute, the plaintiff need not produce any other proof of indebtedness than the attachment affords...*Ib*..... 316
4. The claimant of property under the statute, cannot object on error, that the jury in condemning it to the satisfaction of the plaintiff's execution, have not found the value of each article separately.—*Phelan* v. *Fancher*..... 449
5. The issue on the trial of the right of property, is an affirmation on the one side that it is liable to plaintiff's execution, and a denial on the other; and a verdict finding the issue in favor of the plaintiff, is equivalent to an affirmance of its truth *in totidum verbis*...*Ib*..... 449
6. The claimant of property cannot object on error, that a judgment rendered on a verdict against him, does not subject the property to the execution, or order a sale..*Ib*..... 449
7. An issue for the trial of the right of property, under the act of 1812, (Aik. Dig. 167,) is a suit at law, within the meaning of the 21st rule of practice in chancery, (1 Stewart's Rep. 618,) and the plaintiff in execution is bound, on the suggestion and affidavit of the claimant, to elect between the dismission of such case, and a bill in chancery for the same claim or demand...*Planters and Merchants' Bank of Mobile* v. *Borland*..... 531

8. On the trial of an issue, whether certain property levied on by an execution in favor of P M B, v. J H W, it is not material whether J H W, was principal, or security in the note, on which the judgment is founded, he being equally liable to the plaintiff in the execution, whether he was one or the other, and evidence to prove his securityship may be rejected....*Ib*..... 531

9. Where the mortgagor of personal property has such an interest therein, as may be sold under an execution for the payment of his debts, the mortgagee can not on the trial of the right of property, upon a claim interposed by him under the statute, introduce proof to show what was the value of the mortgagor's interest, and that it was less than the value of the property in question....*McDonald* v. *Foster & Easton*..... 664

10. To authorise the claimant of property to show on the trial of the right thereto that he is its proprietor, it is not necessary for the issue specially to affirm that fact; it is enough for the claimant to deny that the property is subject to the execution, in the general terms in which the plaintiff asserts it.—*The Branch Bank at Montgomery* v. *Parker*..... 731

11. On the trial of the right of property upon a claim interposed under the statute, the court have a discretion in directing the form of the issue; *but it would seem*, that the only proper issue in such cases is an affirmation on the part of the plaintiff, that the property levied on is subject to his execution, and a denial of that fact by the claimant—*The Planters' and Merchants' Bank of Mobile* v. *Willis & Co*..... 770

12. A surety of the claimant of property in a bond given for the trial of the right, cannot refuse to give evidence for the plaintiff in execution, on the ground of his suretyship....*Ib*..... 771

See *Mortgagor and Mortgagee*, 8.

RIPRARIAN RIGHTS.

1. Under an act of Congress, passed in 1818, the United States caused certain lots in the city of Mobile, lying upon the shore of the bay, to be sold; in 1832, Congress passed an act, confirming a Spanish concession, made in 1806, for the shore by which these lots were bounded, which statute declares that "the patent provided to be issued, shall not be held to interfere with any part of said tract, which may have been disposed of by the United States, previous to the passage of this act; and this act shall be held to be no more than a relinquishment of whatever title the United States may now have to such tract of land." *Held*, that the concession and confirmatory act, did not divest or impair the reparian rights of the purchasers under the act of 1818.—*Abbott's ex'r* v. *Doe, ex dem. Kennedy*..... 393

SALE OF CHATTELS.

1. When the plaintiff, in an action of detinue, makes title to the chattel sued for under a bill of sale, from a former owner, it is not competent for the defendant to show fraud in acquiring this title, if he has no connexion with it.—*Dunklin* v. *Wilkins, et al*..... 199

2. It is otherwise, if he shows he is the agent of the former owner, and detains the chattel by his direction...*Ib*..... 199

3. When a chattel is converted, and the conversion is known to the owner, he

cannot by sale, transfer the title to another, so as to enable the latter to sue in his own name...*Ib*..... 199

4. Where a sale of personal property is absolute, and possession remains with the vendor, and there is no proof of circumstances to explain why possession did not accompany and follow the sale, the vendor being insolvent, in legal contemplation, the evidence of fraud is conclusive—*Planters' and Merchants Bank of Mobile* v. *Borland*..... 53

5. The title of the purchaser of personal property, which was delivered, will not be affected by the failure of the seller to make a bill of sale, which he promised to do at some future time.—*Todd v. Hardie, et al*..... 699

SCIRIE FACIAS.

1. A *scirie facias* against the heir, to subject lands descended to him, to the payment of a judgment obtained against the ancestor, must be sued out in conformity with the statute of this State, and therefore the executor or administrator must be a party.—*Fitzpatrick, et als.* v. *B. & W. Edgar*..... 499

See *Criminal Cases and Proceedings in*, 18, 19.

SET-OFF.

1. Where a judgment is obtained against an administratrix in a suit where she is the plaintiff, (under our statute of set-off; Aik. Dig. 181, § 174,) upon the certificate of the jury, that the plaintiff is indebted to the defendant, and she is afterwards sued on a *devastavit*, such judgment raises no presumption of assets in her hands....*Quigley* v. *Campbell & Cleveland*..... 76

2. T and L, were indebted by a joint and several note to D & Co, and this is reduced to judgment, all the partners suing. B, one of this firm is indebted invidually to T —*Held*, in a suit by T, for the use of another, against B, that the latter cannot set-off the joint judgment recovered by the firm of which he is a partner....*Taylor* v. *Bass*..... 110

3. The sheriff is not competent to determine that one execution shall be set-off against another when he has one in favor of, and another against the same person...*Brazeal, and others* v. *Smith*..... 207

See *Garnishee*, 2.

SHERIFF AND SURETIES.

1. On a motion against the sheriff for failing to return an execution of the Supreme Court, forwarded upon the certificate of the clerk of the Supreme Court, under the act of 23d December, 1840, judgment may be rendered against the sureties of the sheriff at the time of the default, although they have not been notified of the intended motion....*Hughes, et als.* v. *Hale*..... 63

2. When the attorney of the plaintiff, or an agent, sufficiently authorised, induces a sheriff to omit returning an execution, three days before the proper term, by advising him that it will be sufficient if returned on the first day of the court; this will constitute a defence to a rule against the sheriff and his sureties for the neglect to return the execution on the first day of the court—*McClure, et al.* v. *Colclough, et al*..... 65

3. But if the sheriff omits to urge this as a defence, and judgment is rendered against him and his sureties, this is conclusive on them under the statute *Ib* 66

4. In summary proceedings under our statutes which authorise judgments to be

rendered against sureties, without notice, when the principal is notified; the sureties are not entitled to litigate the question of liability, except in the name of the principal. The only matters which they can litigate in such cases, is the *factum* of the bond, and its legal sufficiency. The allowance of judgment against them, does not impair their rights otherwise than to cause them to proceed in another forum to ascertain if they exist....*Ib*..... 66

5. When sureties in such a case seek relief in equity, the allegations of the bill must be equally distinct and positive, as are necessary to constitute a good plea of *non est factum*, at law....*Ib*..... 66

6. The intention of the legislature, in the passage of the act of the 9th January, 1841, was to give the summary remedy by motion against the sureties of a sheriff, or any of them upon whom service of notice was effected, in all cases where they were liable in this summary mode for the default of the sheriff, without notice to the sheriff, in the same manner as if he was notified.—*Bondurant, et als.* v. *The Bank of the State of Alabama*..... 171

7. The sureties of a sheriff may be proceeded against upon a suggestion that the sheriff has made a false return, without notice to him, they having received notice that the suggestion would be mad....*Ib*..... 171

8. Upon a failure to return an execution, the sheriff becomes liable for the amount of the judgment—*Read, et al.* v. *Dunklin*..... 205

9. A notice to a sheriff that a motion will be made against him and his sureties, for failing to pay over a sum of money collected upon an execution, is sufficient when it identifies the execution with certainty, and states the time when it is sued and was placed in the sheriff's hands for collection; the receipt of the money upon it previous to its return day; that the money was demanded by competent authority, and refused, with the time when the demand was made; and also informs the sheriff that a motion will be made against him and his sureties, on a certain day or term of the court, for the sum so refused to be paid, with the damages allowed by statute.—*Brazeal, and others* v. *Smith*..... 206

10. In a motion against the sheriff and his sureties, when he is served with notice, the bond is no way essential, yet it may be introduced in evidence, to show he was in office, when he received the money, and when competent as evidence, may be established by the certificate of the clerk of the court, in whose custody it is placed by law....*Ib*..... 207

11. Under the statute which requires that the appointment of an agent shall be indorsed on the execution, when the plaintiff does not reside in the county to which it goes, or shall be made in writing, the sheriff may refuse to pay until such evidence is furnished him, but he waives this either by paying a part of the money, or in any other manner, recognizing the agency..*Ib*..... 207

12. The sheriff is not competent to determine that one execution shall be set-off against another when he has one in favor of, and another against the same person..*Ib*..... 207

13. Where the active interest in an execution has been assigned by the plaintiff, his assignee is authorised to use the name of his assignor in a rule against the sheriff and his sureties....*Ib*..... 207

14. Where a sheriff collects money by the sale of perishable property levied on by an attachment, under an order made pending the cause; if the attachment is

returnable to the circuit or county court, the clerk of the one court or the other, according as the fact may be (and not the officer making the order,) is authorised to institute a proceeding by notice, under the attachment law of 1833, against the sheriff and his sureties —*Ried, et al.* v. *Bibb, use* &c.....281

15. A plea by the sureties of a sheriff, that judgments have been recovered against them, as sureties of the sheriff to the amount of the penalty of the official bond, and that the judgments are unreversed, is bad, because it does not aver that the judgments have been paid by them, or that they are still unsatisfied.—*Moore* v. *Worsham, Sims & Hargrove*..... 645

16. *Semble;* a deputy sheriff, who has levied a *fieri facias*, may bid for and purchase the property at a sale made by his principal—*Wyatt* v. *Clepper*.....703

See *Practice* 4, 6.

See *Summary Proceedings*, 2, 18.

See *Costs*, 6, 7.

STATUTES.

1. The statute of non-claim [Dig. 153, § 6] creates a complete bar, by the omission to exhibit the demand to the administrator within eighteen months, in all cases not excepted by the statute, whether the administrator does or does not make publication, as required by another section of the same act; [Dig. 180, § 12] and therefore a replication to a plea of *plene administravit* is bad, when it offers an issue upon the fact of advertising....*Thrash* v. *Sumwalt*.....14

2. The 25th section of the 8th chapter of the act "Regulating punishments under the Penitentiary system," makes the return of "Not found" to an *original* and *alias scire facias*, equivalent to personal service.—*Badger & Clayton* v. *The State*.....22

3. The act of 1839, "To abolish attorneys fees in certain cases," in requiring that the defendant shall plead to the merits within the first week of the appearance term, or forfeit his right to make any defence thereafter, though imperative in its terms, must be so construed as to authorise the court in which the suit is pending, in its discretion, to permit the defendant to plead at a subsequent term.—*Sally, use*, &c. v. *Gooden*.....78

4. An affidavit to hold to bail, which affirms that the defendant "has fraudulently conveyed, or is about fraudulently conveying his estate or effects," is defective under the act of 1839 "to abolish imprisonment for debt," because it is in the alternative, instead of alleging one distinct ground.—*Wade* v. *Judge*. 130

5. The statutes of 1807, '11, '21, '33 and '39, in respect to insolvent debtors, are parts of an entire system, and to be considered *in pari materia:* these several acts regard the schedule of the debtor rendered after arrest, when accepted by a court or judicial officer, as a transfer in law of the effects to which it refers, to the sheriff of the county in which they are found. But if the creditor fail to obtain judgment, or the debtor is otherwise legally discharged, the legal assignment is avoided and the property re-vests in the debtor.—*Ib.*.....130

6. The act of 1837 "More effectually to provide for discoveries in suits at common law," authorises a party to propose to his adversary such questions only, as he would be bound to answer upon a bill of discovery in a court of chancery: *It was consequently held*, that the defendant was not bound to answer interrogatories which called on him to state whether he had entered as credits on the note in suit, all the money that had been paid thereon; but to make such

interrogatories pertinent, it should appear either from the interrogatories or affidavit accompanying them, that other payments than those credited, had been made.—*Goodwin* v. *Wood*, *use*, &c.....152

7. The intention of the legislature, in the passage of the act of the 9th January, 1841; was to give the summary remedy by motion against the sureties of a sheriff, or any of them upon whom service of notice was effected, in all cases where they were liable in this summary mode for the default of the sheriff, without notice to the sheriff, in the same manner as if he was notified.—*Bondurant, et als.* v. *The Bank of the State of Alabama*.....171
8. The third section of the act of 1835, (Digest, 621,) impliedly inhibits the issuing of an execution on a judgment then in existence, after a lapse of ten years, although one was sued out within the year and day, but never continued afterwards. And an execution issued after such a lapse of time without reviving the judgment by *sci. fa.* is irregular, and subject to be set aside.—*Van Cleave* v. *Haworth*..... 188
9. The act of 1839, in Meek's Supplement, p. 113, § 4, does not in this respect, change the act of 1814. (Aik. Dig. 294, § 11.)—*Ivey* v. *Pierce*, *use*, &c. 374
10. The act of 31st December, 1841, the more speedily to collect debts against corporations, does not have a retrospective effect, so as to authorize a suit commenced before its passage.—*Bingham* v. *Rushing*. 403

See *Landlord and Tenant*, 1.

See *Corporations*, 2.

See *Riparian Rights*, 1.

SUMMARY PROCEEDINGS.

1. The result of all the cases in this court, upon summary judgments rendered on motion is, that when the judgment is by *default*, it must appear by the judgment of the court, that the defendant had the notice which the law requires, and that the facts were proved, which gives the court jurisdiction, and shows the liability of the defendant for the debt or penalty. If the defendant appear, it will be evidence of notice, and if an issue is made up and submitted to a jury, it is then like any other cause commenced in the ordinary mode, except that it must appear upon the record, that the court had jurisdiction to entertain the motion.—*Smith, et als.* v. *The Branch Bank at Mobile*..... 26
2. In summary proceedings under our statutes which authorise judgments to be rendered against sureties, without notice, when the principal is notified ; the sureties are not entitled to litigate the question of liability, except in the name of the principal. The only matters which they can litigate in such cases, is the *factum* of the bond, and its legal sufficiency. The allowance of judgment against them, does not impair their rights otherwise than to cause them to proceed in another forum to ascertain if they exist.—*McClure, et al.* v *Colclough, et al*..... 66
3. To sustain a judgment under the act of 1827, which gives to the sheriff a summary remedy by notice and motion, against the principal and his surety, in a bond of indemnity, the record should show that the obligors had sixty days previous notice that a judgment would be moved for against them ; it is not enough that the judgment entry recites that they had notice for that length of time of the pendency of the suit against the sheriff.—*Magee & Mansony* v. *Toulmin*..... 141

4. Where the judgment in a summary proceeding, at the suit of [illegible] its debtor, recites that a notice and certificate were produced to [illegible], &c., it will be intended that the notice and certificate found in the transcript, were those on which the court acted —*Jordan, ex'r, et al.* v. *The Branch Bank at Huntsville* 284

5. The notice described a note payable to the order of J C W, by him indorsed to J W W, and by the latter to the Bank, while the judgment described the note payable to J C W, by him indorsed to J W W, and by the said J C W to the Bank: *Held*, that the recital in the judgment, that J C W indorsed the note to the plaintiff, would be regarded as a clerical misprision, amendable by a reference to the notice.—*Ib.* 284

6. Where the judgment refers to, and inaccurately recites the certificate of the President of the Bank, the certificate found in the transcript may be looked to for the purpose of correcting and supporting the judgment.—*Ib.* 285

7. In a summary proceeding, at the suit of a Bank, against its debtor, an appellate court will not look to the notice sent up with the record, for the purpose of contradicting the recital in the judgment, where there had been no contestation in the primary tribunal.—*Snelgrove* v. *The Branch Bank at Mobile*..... 295

8. The right of the Branch Bank at Mobile, to recover judgment on thirty days notice, in a summary proceeding, authorised by the statute, creating the institution; and the provisions of the statute must be strictly pursued.—*Murphy's adm'rs* v. *The Branch Bank of the State of Alabama at Mobile*..... 421

9. That remedy is only given against the *maker* or *endorser* of a note, bill, or bond; and is not authorised against the *representatives* of a deceased maker or endorser.—*Ib.* 421

10. The administrators of a joint maker of a note, &c, cannot be sued jointly with the surviving makers.—*Ib.* 421

11. The Branch Bank at Montgomery cannot obtain judgment against the representatives of a deceased maker of a promissory note, &c, on motion. It is a summary remedy given by statute, which cannot be extended by construction. *Administrators of Alexander* v. *The Branch Bank at Montgomery*..... 465

12. In a summary proceeding under the act of 1821, at the suit of a surety against his principal, to recover back money paid on a judgment, the record must show in which court the judgment against the surety was rendered.—*Elliott* v. *Clements* 470

13. The act of 1821, authorising a summary judgment against banks generally, on failure to redeem their notes, on ten days' notice being given of the intended motion, is repugnant to the thirteenth section of the charter of the Branch Bank at Decatur, which requires thirty days' notice of such motion, and is, therefore, as it regards the time of notice, repealed.—*The Branch Bank at Decatur* v. *Jones*..... 487

14. In summary proceedings against a constable and his sureties, for money collected on execution, the circuit or county court has jurisdiction, where the amount in controversy exceeds fifty dollars; and the notice in such case may be directed to the sheriff to be served.—*Johnson, et al.* v. *J. & B. F. Petty.* 528

15. It is no objection to a notice issued to a constable and his sureties, preparatory to a motion against them, to recover money collected by the former on execution, that instead of setting out the first names of the plaintiffs at length, the initials only are stated.—*Ib.* 528

16. A summary proceeding commenced by motion, when the parties appear and

...ed by the jury, is then, like any other suit, commenced in the or... and to be governed by the same rules, with the single exception that it must appear on the record, that the court had jurisdiction.—*Garey. et als.* v. *Frost & Dickenson*.....636

17. When the sureties are not parties to the motion, the fact of suretyship can not be found by the jury, but should be proved to the court, and it should appear on the record, that such proof was made.—*Ib.* 636

18. A notice by the President and Directors of the Bank of the State of Alabama, with the seal of the corporation is a sufficient compliance with the charter, which requires the notice to be given by the President of the Bank.—*Crawford, et als.* v. *The State Bank*.....679

19. Where a coroner collects money under an execution, which is afterwards quashed, before the money is paid over, the defendants cannot, by notice and motion, recover of the coroner, the amount thus collected and retained.—*Riley* v. *Marshall, et al*.....682

SUNDAY.

1. A contract founded on an act prohibited by statute, is void; therefore, a note executed upon the purchase of a horse by the vendee, on Sunday, cannot be enforced by the vendor in a court of justice.—*O'Donnell, et als.* v *Sweeney*. 407

SUPERSEDEAS.

1. Where the petition for a *supersedeas* refers to the execution, and prays that the same may be superseded, the execution is thereby made part of the record, and will be so regarded by an appellate court —*Oswitchee Co.* v *Hope & Co.* 629

2. Where an execution is superseded upon a petition filed in vacation, it is not necessary for the defendant in execution to move the court to quash it: the petition itself, is a motion to that effect, and may be so considered even where a *supersedeas* has improvidently issued.—*Ib.* 629

SURETIES.

1. A surety has the right to stand upon the precise terms of his contract, and any alteration made, without his consent, either in the terms of the original agreement or mode of performance, will exonerate him from liability.—*McKay and McDonald* v. *Dodge & McKay, survivors, &c*..... 388

2. When two parties agree to leave certain matters in dispute between them, to the award of certain persons, who are named, and subsequently a third person becomes surety for one of the parties, that he will perform the award which may be made against him on the submission; and afterwards, and without the consent of the surety, an agreement is made that other persons may be substituted in place of such of the arbitrators as fail to attend, and accordingly two others are substituted, but a majority of the original referees act, and make an award: *Held*, that this was such an alteration of the original contract as absolved the surety from liability on the award so made. *Ib*..... 388

3. Notwithstanding a joint obligor of a bond, or maker of a promissory note may appear on its face as a principal, he may prove, by parol, he was a security; such having been understood as the relation of the parties between themselves.—*Pollard* v. *Stanton*..... 451

4. In a summary proceediug under the act of 1821, at the suit of a surety against his principal, to recover back money paid on a judgment, the record must show in which court the judgment against the surety was rendered.—*Elliott* v. *Clements*.....470

5. Accommodation endorsers as such merely, are not liable as co-sureties, to contribution. To constitute that relation between successive accommodation endorsers, there must be an agreement to that effect between them, or some fact or circumstance must exist from which such an agreement may be inferred. *Sherrod* v *Rhodes*.....684

6. A surety of the claimant of property in a bond given for the trial of the right, cannot refuse to give evidence for the plaintiff in execution, on the ground of his suretyship...*Planters' and Merchants' Bank of Mobile* v *Willis* & *Co.* 771

See *Contract*, 9.

See *Summary Proceedings*, 17.

See *Error and Writ of*, 14.

TAXES AND COLLECTION OF

1. To sustain a sale of land for taxes, by the Marshal and Collector of Wetumpka the party claiming under it, must show that every pre-requisite has been strictly performed—*Pope and Hamner* v. *Headen*.....433

TRESPASS TO TRY TITLE.

1. The damages in an action of trespass to try title, cannot be lessened or mitigated by evidence that the plaintiff paid an inadequate price for the land sought to be recovered.—*Love and Williams* v. *Powell*.....58

TRUST AND TRUSTEE.

1. A purchase by a trustee from his *cestui que trust*, though open to inquiry within a reasonable time, puts an end to the trust—*Johnson v. Johnson*.....90

2. A purchase by an administrator of one of the distributees, shortly after he came of age, of all his interest in his father's estate, the administrator having rendered no inventory of the estate, or stated an account, and the purchase being made at a grossly inadequate price, considered fraudulent and voidable at the election of the distributee, if application had been made for that purpose within a reasonable time afterwards, or within a reasonable time after obtaining knowlegde of the fraud....*Ib*..... 90

3. Where one receives personal property, which upon the happening of certain events, is to be distributed among other persons, upon his death, his personal representative will take it as a *trustee*, for those between whom it is to be divided; and such representative can make no division which will interfere with the rights of the *cestui que trust*.—*Dearman* v. *Radcliffe*..... 192

4. Under such a trust, the children of M W, or their descendants are entitled to the use of the property, and the possession of the slaves by their father, is a possession by him as their natural guardian, and although it may have remained for more than three years without the assertion of title by the trustee, cannot be considered as a loan to the father, so as to bring the slaves within the influence of the statute of frauds, and make a purchase from him valid—*Thomas* v. *Wallace*..... 268

5. Where slaves and other property were given to infants by deed, and one of the conditions of the gift was, that the donees were to keep the negroes and other property together, in the possession of their mother, for their use and benefit, until the youngest came of age—*Held*, first, that the mother was thereby created a trustee, to appropriate the avails of the labor of the slaves to the maintenance of the infants, the father being insolvent: Second, that as the infants had no land to cultivate, it was proper in the mother to provide land for that purpose, and that the trust fund was not the crops made by the slaves, assisted by others which the mother procured, nor the price of the hire of such slaves, but the actual value of the labor of the slaves: Third, that to ascertain the trust fund, an account must be stated annually, charging her with the value of the labor of the slaves, and giving her credit for a reasonable sum, for her care, attention and labor in the supervision of the slaves, also for the board and clothing of the children, and for all monies expended in their education, and for medical attention during sickness. That if the balance of the account thus stated, was against her in any one year, she might carry it forward to succeeding years, when the balance might be in her favor, but could not lessen the principal of the trust fund, without first obtaining an order from the chancellor.—*Bethea* v. *McColl, et als*..... 308

6. Although a deed of assignment may be declared fraudulent and void, at the instance of a creditor, the title of purchasers of the trust property from the trustee previous to the filing of the bill and without notice of the fraud, will be protected; and the trustee in the settlement of the account will be entitled to a credit for all payments to the creditors of the assignor made previous to the filing of the bill, from the proceeds of the *choses in action* placed under his control by the assignment...*Cummings & Cooper* v *McCullough*..... 324

7. A deed of trust being made and recorded, the maker of the deed, who, until default, was entitled to the possession of the property conveyed by the deed, sold it to McC & C, who sold it to G.—*Held*, that the title to G being the title of the maker of the deed, was not adverse or hostile to that of the trustee—*Foster* v. *Goree*..... 424

8. A trustee must sell according to the terms of the deed; but if an irregular sale is made, it may be waived by the maker of the deed and the *cestui que trust;* and in that event no one else can complain...*Ib*..... 424

9. Regularly, personal property should be present at a trust sale; but if the maker of the deed, or one holding under him, refuse to produce it on the day of sale, he cannot afterwards object that it is sold in its absence, if the *cestui que trust* waives his right to have it present at the sale..*Ib*..... 425

10. When a trust fund is in danger of being waisted or misapplied, a court of chancery will interfere at the instance of those interested in it, and by the appointment of a receiver, or in some other mode, prevent the destruction of the fund. This rule applies to executors and administrators, as to all other trustees—*Calhoun, by his next friend v. King, et al*..... 523

11. Where one administered on an estate in Georgia, in 1826, and some ten or twelve years since came to this State, bringing with him the minor distributees, and the property of the estate, and died in possession thereof; and the property

being about to be sold for the payment of his debts, a court of chancery may interfere by injunction, at the instance of a minor distributee, and prevent the sale of the property, although it is not shown that the surety to the official bond of the administrator in Georgia is insolvent....*Ib*..... 523

12. In such a case, if no settlement has been made by the administrator with the probate court in Georgia, the court of chancery has power to ascertain the amount in the hands of the administrator, subject to distribution, and the amount or value of the distributive share of the complainant...*Ib*..... 523

See *Vendor and Vendee*, 15.

USURY.

1. When a judgment is affirmed on writ of error, it is error to compute the interest then due on the judgment, and render judgment for the aggregate amount in the appellate court, as that would be compounding the interest—*Richards and others, v. Griffin*..... 196

VENDOR AND VENDEE.

1. When a bill is filed by a vendor to enforce his lien for the purchase money, his vendee, who has parted with all his interest in the land to another, is not an indispensable party defendant to the bill; but he may be joined at the election of the complainant, and when a party is concluded by the decree...*Batre, et al.* v. *Auze's heirs*, &c..... 173

2. In a bill filed by the vendor of lands, to enforce his lien for the purchase money after the complainant's death, his personal representatives, and not his heirs, are the parties entitled to service; and if both join in reviving the suit, it is an irregularity which can be reached by demurrer, but not in the first instance upon error—*Ib*.....173

3. In a bill filed against a sub-purchaser to enforce the vendor's lien for the purchase money, due from the first purchaser, after the death of the sub-purchaser the suit must be revived against his heirs at law, unless he has parted with his interest by assignment or devise; and if the suit is revived against his personal representative only, it is error...*Ib*..... 173

4. The equitable lien of the vendor of land, cannot be enforced against the vendee, at the suit of an assignee of the note given for the purchase money, where the note was assigned by the vendor without recourse.--*Hall's ex'rs* v. *Click, et al*..... 363

5. When upon a sale of land, upon future payment of the consideration, the vendor gives his bond for title when the purchase money is fully paid, he retains a lien, in the nature of a mortgage, upon the premises sold.---*Chapman* v. *Chunn, et al*.....397

6. In such case, if the purchase money be not paid, chancery may decree a sale of the property, and apply the proceeds to its satisfaction.---*Ib*..... 397

7. A bill filed by the vendor, under such circumstances, need not disclose the nature of the vendor's title.—*Ib*..... 397

8. This lien is not impaired by the circumstance of the vendor's contracting, at the time of sale, to take, or actually taking, personal security for the payment of the purchase money.—*Ib*.....397

9. That one has been placed in possession of land by the vendee, under such a

sale, retaining the same, and claiming and refusing to pay over rents and profits, are sufficient grounds for making him a party to a bill filed to subject the land to payment of the consideration.—*Ib.* 397

10. It is no ground for rescinding a contract for the sale of land, when it appear, ed that the vendee was put in possession of the land he intended to purchase, and the vendor intended to sell, although a part of the land was incorrectly described in the bond executed by the vendor for title; he being able and willing to correct the mistake, and to make title according to his contract.—*Evans* v. *Bolling*..... 551

11. A contract cannot be rescinded because the vendor had not title to a part of the land sold, when the contract was made, but which he obtained before any demand for title, or offer to rescind the contract by the vendee.—*Ib*..... 551

12. Upon a sale of land, the vendor received from the vendees part of the purchase money in hand, and for the residue took their notes payable in two instalments of about one and two years, and executed to them his bond to make title to the land so soon as he obtained the patent from the United States. The patent did not arrive until after the last note fell due: *Held*, that the vendees could not demand title without paying, or offering to pay the purchase money. *Duncan* v. *Jeter*. 604

13. If a vendee of land wishes to rescind the contract of sale, he must pay or offer to pay the purchase money, according to his contract, and if the vendor refuses to make the title, the vendee may rescind the contract by returning, or offering to return the possession, and must abandon the possession, unless some circumstance, such as the insolvency of the vendor, or other sufficient cause authorises the retention of possession for his indemnity.—*Ib*..... 604

14. A father purchased land and paid the purchase money, declaring, at the time, that it was for his son, for whom he intended it as an advancement, and four years thereafter he caused the vendor to execute a deed to the son: *Held*, that the son was not entitled to hold the land, against those who became creditors of the father between the time of the purchase and the conveyance.—*Doe, ex dem. Davis* v. *McKinney and McKinney*..... 719

15. Where one man buys land in the name of another, and pays for it, it will generally be held by the grantee in trust for the person who pays the money; but the inference of a resulting trust is *prima facie* repelled, where the money is paid by the father or husband, and the deed taken in the name of his child or wife But in such case it is open to explanation, and if shown that the father or husband intended to defraud his creditors, he will be deemed to have a *resulting trust*, which may be subjected to the payment of his debts.—*Ib*..... 719

16. Since the statute of 1820, a title in lands which is merely equitable, can only be sold for the payment of debts by suit in chancery: consequently, a purchaser under execution where the defendant had only an equitable title, acquires nothing by his purchase; and the law is the same if the defendant was in the possession... *Ib*..... 719

17. The vendor of land executed a bond, reciting that he had sold to the obligee "half of the south of section 17, &c.:" Held, that as according to our surveys there was no such sub-division, the land sold must have been the "half of the south half of section 17, &c.," and such was but a reasonable construction of the terms used; especially when considered in reference to the principle tha

authorises a bond to be construed most strongly against the obligor [illegible] contract could not be carried into effect by reason of the ambiguity, the bond might be reformed on proof of fraud, mistake, or want of skill in expressing the intention of the parties.---*Bass & Carter* v. *Gilliland's heirs*.....761

18. Where the vendor of land prevents the vendee from paying the purchase money, according to the terms of his contract, when the latter is ready and offers to pay, he cannot insist upon its non-payment as a reason why he should not be compelled to execute his contract.---*Ib.*.....761

19. Although the condition of a title bond, provides, that if the vendee shall pay his notes when the same becomes due, the bond shall continue in full force; if not, then the bond is to be handed over to the vendor and the notes given back to the vendee, it may be questionable whether the vendee can put an end to his contract by failing to pay. But, if when the day of payment arrives, the vendee announces his readiness, and the vendor assents to a delay, the latter cannot refuse to execute the contract upon the ground that the right of rescission was mutual, where it appears that the vendee has been all the time both ready and willing to comply with his undertaking.---*Ib.*.....761

20. Where a vendor who has undertaken to convey one-half of a tract of land, states in answer to a bill for a specific performance, that he has conveyed to a third person, about two-thirds of it in quantity and one-half in value; if the vendee elects to take the remaining third, a decree directing a title to vest in him for that quantity, being the lands unsold by the vendor, would be regular.---*Ib.* 761

21. Where the vendee of land files his bill for a specific performance of the vendor's contract, upon an allegation of an actual tender of the purchase money on the day when it became due, an avowal of his continued readiness to pay, and an offer to bring the money into court; if the tender be proved, and there be no evidence to show that the vendee has not retained the money, he should not be charged with interest. And in such a case, an offer to bring the money into court, as the chancellor may direct, is sufficient to authorise chancery to entertain the bill, and administer justice between the parties.---*Ib.*.....761

See *Covenant*, 4.

VERDICT.

1. If either party is dissatisfied with the verdict on a foreign issue, an application should be made, not to the court in which it was tried, but to the court of chancery, where, notwithstanding the improper reception or rejection of evidence, a new trial will not be granted, if the result is such as it should have been—*Alexander, by his guardian v. Alexander*.....517

See *Criminal Cases, and Proceedings in.*

WILL, AND PROBATE OF.

1. When a general and particular interest are equally apparent on a will, and are so repugnant to each other that both cannot stand together, the latter must yield to the former; but it is the duty of the court, if possible, to put such a construction on the will as will give effect to every part of it.—*Stallsworth, et al.* v. *Stallsworth, ex'r.*.....143

2. When a testator, by his will, bequeathed slaves to his children, and afterwards directed a tract of land to be set apart for the use of his wife and the minor

children together with horses, stock, &c. for their exclusive use, until the youngest child, who may then be living, arrives at the age of twenty-one, and then that the real estate be sold and equally divided between the wife and such of the minors as might then be alive---held, that there was no incongruity between these clauses of the will, but that both could stand together-- that the intention of the testator was that the minor heirs were entitled to their legacies as soon as distribution could be made, and had the right to work their slaves on the land set apart, in concert with their mother. --*Ib.*.....143

3. The construction of a will, or other writing, where the meaning and intention of its author is to be gathered from the paper alone, involves a *mere legal inquiry*, which is to be decided by the court.---*Sorrelle's ex'rs* v. *Sorrelle.* 245

WITNESS.

1. A *fieri facias* was issued against the property of H Y, C B M, and others, and levied on certain slaves as the property of the former ; to which D Y interposed a claim, and gave bond to try the right, pursuant to the statute. On the trial, the plaintiff in execution offered as a witness, C B M, to prove that the slaves in question were the property of H Y : *Held*, that he was interested in subjecting them to the satisfaction of the execution, and therefore an incompetent witness.—*Yarborough's ex'r* v. *Scott's ex'r.* 221
2. The widow of a co-maker of a promissory note is a competent witness in a suit by the payee against the other joint maker, to prove that a payment endorsed on a note, was one hundred and not one thousand dollars; and it will make no difference that an entry, suggesting the death of her husband, had not been made in the cause, at the time her deposition was taken.---*Saunders* v. *Hendrix*..... 224
3. If the father, by bringing suit, in which it becomes necessary to prove the age of the child, is thereby incapacitated from being a witness, he cannot introduce the secondary evidence of his own declaration of the time of its birth, although he may be the only witness who can prove the fact.---*Blann* v. *Beal*..... 357
4. A joint and several maker of a promissory note, who is not a party to the case, on trial, against another maker, is a competent witness.---*Thompson v. Armstrong, use, &c.*.....383
5. The mere fact of his being a party to the note, independently of other testimony, goes to his credit---not to his competency.---*Ib.*.....383
6. A witness, who has an interest in the event of the suit, may be rendered competent by release, from the person to whom he may be liable---and a delivery by the releasor to the releasee, personally, is not necessary---it may be filed in court. *Brown* v. *Brown*.....508
7. As a general rule, a witness can only depose to facts *within his own knowledge*, and he cannot be permitted to speak of the *intentions* or *thoughts* of another, either positively, or as to his own opinion or belief.---*Planters' and Merchants' Bank of Mobile* v. *Borland.* 531
8. The credit of a witness may be impeached after the publication of his testimony, by *articles of impeachment*, upon the filing of which an order will be granted, that the party be at liberty to examine witnesses as to the credit of the witness whose testimony is impeached. Upon this examination, the only enquiry is, whether the witness is to be believed as a man of veracity, or not. No fact material to the issue can be enquired into ; but if the witness, on his examination, had stated a fact falsely, *not in issue*, it may be contradicted. The 44th

rule of chancery practice, dispensing with the necessity of filing "articles of impeachment," does not vary the case---the examination must still be confined to the credit of the witness sought to be impeached.---*Evans* v. *Bolling*. 550

9. Evidence is not admissible to prove declarations of his interest, in the matter of controversy, previously made by a witness, unless he has been examined as to such declarations, and had the opportunity of admitting, denying, or explaining such declarations.---*Weaver, use, &c.* v. *Traylor*. 564

10. A witness cannot be excused from testifying against the sheriff, on a motion against him, on the ground that he is one of his sureties, unless he is a party on the record, to the motion.---*Garey, et als.* v. *Frost & Dickenson*..... 636

11. Where an action is brought against several persons as partners, and one of them suffers a judgment by default, the latter is a competent witness for the other defendants to prove that they were not his partners; for a verdict in their favor will not, under the statute, operate a discontinuance of the action as to him.---*Scott, surviving partner, &c.* v. *Jones, et al*..... 694

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